Google

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

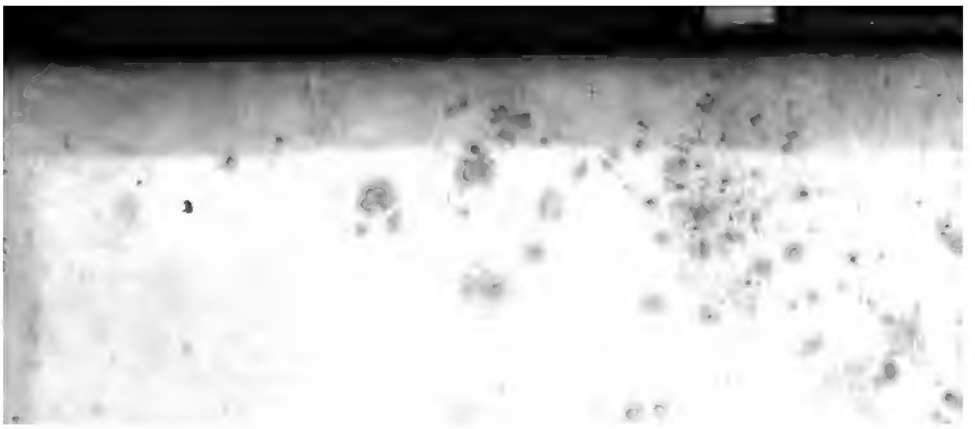
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/



8°. Jur.
A. 19. 117 a

Cw. U. K.
100
D. 105.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF ADMIRALTY;

COMMENCING WITH THE

JUDGMENTS

OF

THE RIGHT HON. SIR WILLIAM SCOTT,

Trinity Term 1811.

By JOHN DODSON, LL.D. ADVOCATE.

Eo magis neceſſaria eſt hæc opera quod et noſtro ſæculo non deſunt, et olim non defuerunt, qui hanc juris partem ita contemnerent, quaſi nihil ejus præter inane nomen exiſteret.—*Grotius.*

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,

FOR J. BUTTERWORTH & SON, LAW-BOOKSELLERS, FLEET-STREET,

AND J. COOKE, ORMOND-QUAY, DUBLIN.

1815.

TO

THE RIGHT HONOURABLE

JOHN LORD SHEFFIELD,

BARON SHEFFIELD OF SHEFFIELD,

IN THE COUNTY OF YORK,

AND OF DUNAMORE AND ROSCOMMON IN THE KINGDOM OF IRELAND,

ONE OF HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL,

&c. &c.

THESE REPORTS,

ARE,

WITH HIS LORDSHIP'S PERMISSION,

MOST RESPECTFULLY DEDICATED,

BY HIS LORDSHIP'S OBEDIENT

AND VERY HUMBLE SERVANT,

JOHN DODSON.

ADVERTISEMENT.

THE following pages contain an attempt to continue the *Reports of Cases argued and determined in the High Court of Admiralty*, upon the same plan on which the proceedings of that Court have been hitherto recorded. The Editor is well aware that the excellence of the Reports for which the Public is indebted to his learned predecessors, Sir Christopher Robinson and Dr. Edwards, has rendered his task more difficult; but though he cannot venture to hope that his efforts have been equally successful with theirs, yet he trusts that the inconvenience which must have arisen from an entire discontinuance of the publication has been prevented, and that the utility of his undertaking will in some degree compensate for the defects in its execution. The Public may rest assured, that great care has been taken to state correctly all the facts upon which the decisions of the Court have been founded, and to preserve without diminution or addition all the legal principles which have

received

received confirmation from the very high authority that at present presides in the Court of Admiralty. He has to thank the most experienced Members of the profession for the assistance they have kindly rendered him; and as a very considerable part of this Work has already been submitted to their inspection, he feels confident that in what has thus been revised, no material error can have escaped their penetration and learning.

Doctors Commons,
October 10th, 1815.

TABLE

OF

CASES REPORTED

IN THIS VOLUME.

	Page
ÆOLUS, *Mynne*	300
ALERT, *Nicholls*	236
ALEXANDER, *Tate*	278
ANGERONA, *Marks*	382
ANNA MARIA, *Wolgahayer*	209
ANN, *Smith*	221
ARTHUR, *Rathbone*	423
AUGUSTA, *De Bluhn*	283
BEAVER, *Jones*	152
BELVIDERE, *Marſh*	353
BENNET, *Partridge* otherwiſe *Younghuſband*	175
BETSEY, *Hay*	289
BLENDEN-HALL	414
BUENOS-AYRES	28
CEYLON, *Mulac*	105
CHARLOTTA, *Dupleix*	387
CHARLOTTE, *Avery*	212
CHARLOTTE CAROLINE, *Ader*	192
CLORINDE, *Le Garde*	436
DANKBAARKEIT, *Forbeck*	183
DEMARARA, and its Dependencies	263
DIANA, *Berthè* otherwiſe *Barclay*	95
DILIGENTIA, *Moller*	404
DONNA MARIANNA	91
DRIE VRIENDEN, *Caſſens*	269
DRUMMOND, *Langdon*	103
EDEL CATHARINA, *Clauſen*	55
ELIZA ANN, and others	244
EL RAYO	42
EMPRESS, *Moran*	368
FANNY, *Lawton*	443
FINANCIER, *Cathell*	61
FOLTINA, *Julins*	450
FORTUNA, *Veriſſimo*	81
FREDERICK, *Bodom*	266
FREUNDSCHAFT, *Kock*	316
FRIENDSHIP, *Cox*	373
GALEN, *Rogers*	429
GEORGIANA, *Pitts*	397

GEORGE

TABLE OF CASES REPORTED.

	Page
GEORGE THE THIRD, *Scott* -	311
GUTE HOFFNUNG, *Stefsins* -	251
HARP, *Bertoddy*	471
HENRIETTA, *Jurgienſen*	168
HOPE, and others	226
HUNTER, *Rogers*	480
JANE, *Birkley*	461
JOHN, *Turner*	363
JOHN, *Buchanan*	380
JONGE JAN, *Schuil*	453
LA BELLE COQUETTE, *Andrieux* -	19
LA YSABEL, *Bozo*	273
L'ELISE or LOUISE	442
L'ESPERANCE, *Stegman*	46
LE NIEMEN, *Dupotet*	9
LOUISA, *Higginbotham*	317
LOUISE CHARLOTTE DE GULDENERONE, *Hanſen*	308
MADONNA D'IDRA, *Papaghica* -	37
MANLY, *Hanſen*	257
MARIA THERESA, *Phillips*	303
MARY, *Miller*	68
MATILDA, *Rantin*	367
MOLLY, *Eadie*	394
NEPTUNE THE SECOND	467
NIED-ELWIN, NIESS	50
NOSTRA SIGNORA DE LOS DOLORES, *Morales*	290
POMONA, *M'Naught*	25
RHADAMANTHE, *Mayer*	201
ROSE IN BLOOM, *Olcott*	57
SARAH, *Gill*	77
SEDULOUS, *Mills*	253
SEE-REUTER, *Lange*	22
SEYERSTADT, *Erbe*	241
SPARKLER, *Brown*	359
SUCCESS, *Smith*	131
SWIFT, *Begbie*	320
TORTOLA, *M'Kie*	120
UNION, *Olmſted*	346
VIXEN, *Hutchings*	136
VREEDE, *Hoffker*	1
VROW-DEBORAH, *Luyk*	160
VROW-MINA, *Behrends*	234
WOHLFORTH, *Steenveld*	305

REPORTS

OF

CASES

DETERMINED IN THE

HIGH COURT OF ADMIRALTY,

&c. &c. &c.

VREEDE, HOFFKER.

February 5th, 1811.

Goods delivered on bail to anſwer adjudication in 1800.—Payment not demanded till 1810, the principal and one of the Sureties having in the intermediate time become bankrupts.—Queſtion, whether Court would enforce the bond againſt the other ſurety after ſuch a lapſe of time.—Explanation of delay required from agent.—Authorities in Chancery cited—Surety ultimately compelled to pay.

THIS veſſel, laden with a cargo of rice, ſugar, coffee, and other goods, was captured on the ſecond of *May* 1799, by His Majeſty's ſhip *Ranger*, *Charles Campbell* Eſquire, commander, and carried into *Yarmouth*. The uſual proceedings were inſtituted by the King's Proctor, and on the 15th of *June* a claim was given by Mr. *Vink*, one of the partners in the houſe of *Van Dyck*, *Gevens*, and Co. of *London*, merchants, for forty-one caſes of ſugar and nine caſks of coffee, and alſo for fifty caſks of rice. On the 18th of *October* 1800, bail was given to anſwer adjudication by *Gideon De Bie* and *John Tullock*, and the goods were in conſequence delivered up to the Claimant. On the 13th of *May* 1801, the Judge decreed the fifty caſks of rice to be reſtored, and condemned the ſugar and coffee, which amounted in value to the ſum of £650 9*s.* 6*d.* This ſum had never

The VREEDE.

February 5th, 1811.

been paid or demanded till the 14th of *April* 1810, when a monition was extracted againſt the parties to bring in the value of the goods condemned. An attachment was now prayed againſt them for not complying with the terms of the monition. The Claimant himſelf, and one of the ſureties, Mr. *Tullock*, had become bankrupts ſince the bail was given.

On the part of the Captor—The King's Advocate and *Swabey*.—The bail which has been given is common bail to anſwer adjudication: It is ſubſtituted for the thing itſelf, and although ſome of the parties have ſince become bankrupts, that is not ſufficient to diſcharge them of their reſponſibility. They are, however, *ſeverally* bound by the terms of the bond, and therefore Mr. *De Bie*, who has not become a bankrupt, muſt at all events be reſponſible. The parties muſt know that they have never been diſmiſſed, and are ſtill before the Court. The ſtatute of limitations does not apply, ſince the debt is on record; it is a judgment of the Court, which is ſtill unſatisfied. In the caſe of *Ruſſen* and Co. againſt *Colby*, 1734, it was decided that bankruptcy does not diſcharge a ſurety in the Admiralty. As to its being a caſe of hardſhip, that can form no legal ground on which they can refuſe to be held by the terms of this bail-bond.

For Mr. De Bie, one of the ſureties—Jenner.—It is for the Court in its equity to determine, whether, conſidering the laches of the captor, it will at this late period enforce the bond againſt Mr. *De Bie*. If a demand had been made in due time, the money might have been recovered from *De Vink* himſelf, who has

ſince become a bankrupt; or if demanded from Mr. *De Bie* within any reaſonable time, it would have been in his power to have obtained indemnity from his principal.

The VREEDE.

February 5th, 1811.

Court.—The captors have lain by for nine years, by which delay an extreme hardſhip is thrown on the other party, againſt whom they aſk for an immediate attachment, without giving any explanation of their own conduct in deferring ſo long to put the bond in execution. There muſt have been groſs negligence ſomewhere. I ſhall certainly not decree the attachment till I know more of the matter, and ſee with whom the blame reſts.

On a ſubſequent day Captain *Campbell* ſtated that he was wholly unacquainted with the buſineſs till he made the diſcovery by examining the accounts of his agent; and the agent alſo ſtated, that he was not aware that condemnation had taken place, having never received any communication of that fact from the proper officer; and that he was led to believe, from the information given him by the brokers at *Yarmouth*, that the captors had received every thing to which they could be entitled.

7th *May* 1811.

On the 14th of the ſame month the Judge directed the captor and his agent to account more ſatisfactorily for the delay in calling on the bail to anſwer their recognizance, and decreed a monition to iſſue againſt the agent for that purpoſe.

On the 24th of *July* new affidavits were brought in by Captain *Campbell* and the agent.

The VREEDE.

August 9th, 1811.

JUDGMENT.

Sir *William Scott*.—This is a proceeding againſt the principal and ſureties to enforce the payment of £650 9*s*. 6*d*. the amount of goods delivered on bail to anſwer adjudication. The parties againſt whom theſe proceedings are inſtituted, have, with the exception of Mr. *De Bie*, all become bankrupts. The property it ſeems was condemned in the year 1801, but the monition againſt the bail was not extracted till the month of *April* 1810, nine years after they had entered into the recognizance. The monition was then ſerved upon the parties, and they in return alledge the delay and laches of the captor; aſſerting with great truth, that if due diligence had been uſed in making the demand, the money might have been recovered from Mr. *De Vink* himſelf, the claimant of the property, and inſiſting that the bond cannot now be legally enforced.

The queſtion for the Court to determine is, whether from the length of time and circumſtances of the caſe the bail can be held diſcharged from their reſponſibility. The captors muſt at all events be protected in their rights. The Court felt it its duty to inquire in what manner the delay had ariſen, a delay which has occaſioned a caſe of great hardſhip to Mr. *De Bie*, the only ſecurity who has not become a bankrupt. He has, undoubtedly, great reaſon to complain, and the misfortune under which he labours is attributable either to the miſconduct of the captor or to that of his agent.

A letter has been exhibited on behalf of the agent, purporting to explain his own conduct in the tranſaction. The letter, as far as it is material to the preſent

The VREEDE.

August 9th, 1811.

ſent buſineſs, is in theſe terms:—" Being very deſirous, " as the captors' agent, to give all the explanation in " my power, I have to ſtate that, by Meſſrs. *Steward* " of *Yarmouth*, the brokers who ſold the veſſel and " cargo, their letter of the 11th *January* 1802, in " which they ſent the account-ſales, they ſaid, *this is* " *the remaining part of the cargo*, I was led to conclude " this was all that was coming to the captors: con- " ſequently payment was made to them. I had no " information from the late King's proctor." Now I can by no means conſider this explanation ſatisfactory either in its form or its ſubſtance. It appears hardly poſſible that he could have been miſled by the expreſſions in Meſſrs. *Steward*'s communication reſpecting the account-ſales, ſince he muſt have known that thoſe particular goods were delivered out upon bail to anſwer adjudication, and therefore could not be the goods which compoſed the remainder of the cargo to which the letter of the 11th of *January* referred.

Further ſatisfaction was required by the Court, and an affidavit of Captain *Campbell* has been brought in, wherein he ſtates, that " the agent had the entire and " uncontrolled management of all the *Ranger*'s prizes " committed to his charge; and that he confided " implicitly in him as agent, and, not ſuſpecting that " he was negligent in his duty, did not in any way " interfere in regard to the ſaid prize the *Vreede*." He ſtates likewiſe the manner in which, by the examination of his agent's accounts, he himſelf made the diſcovery reſpecting the money due upon this bond. I muſt ſay, that in my opinion Captain *Campbell* has moſt completely exculpated himſelf from all blame. He had placed his concerns in the hands of an agent, and expected that he would act with diligence and fidelity in

The VREEDE.

August 9th, 1811.

the care of them. Has the agent anſwered the demand made upon him by the Court in a manner equally ſatiſfactory? After ſtating that the ſhip was carried into *Yarmouth*, he ſays, in his affidavit, that "although he "was agent for the captors, the ſuperintendance of "the ſhip and the goods on board her was neceſſarily "removed from the appearer to Meſſrs. *Steward* and "Co. of that place, merchants, as ſole agents or "brokers." Now I can by no means admit that the duties of the agent ceaſed upon the employment of a broker: although not upon the ſpot, it was ſtill his duty to act with care and ſedulity. Is it not the buſineſs of an agent to know in all caſes what becomes of the goods? Is he to make no inquiries as to their reſtitution or condemnation? It is his duty to be urgent "in ſeaſon and out of ſeaſon;" more eſpecially is it expected of him to be careful in his attention to the law proceedings, to watch their courſe, and to inform himſelf accurately of their reſult. The agent goes on to ſay, that "no copy of the condemnation "was ever ſent to him by or from the late King's "proctor, or information of ſuch condemnation, *to "the beſt of his recollection and belief*; as, if it had, "that he ſhould particularly have directed that pro-"ceedings were duly taken againſt the claimant and "his bail to procure payment, and ſhould have cauſed "diſtribution thereof." Now this, it muſt be obſerved, is a charge brought againſt a deceaſed perſon, and that too upon a mere belief and vague recollection of a very remote tranſaction. Neither can I follow him to the concluſion, that if ſuch communication had been made to him, he ſhould have ordered the money to have been demanded, and diſtribution to have been made. But if the charge of negligence againſt the late

late King's proctor were true, is it not the duty of the agent alſo to exerciſe vigilance? If the King's proctor did not tranſmit the ſentence, it was the agent's duty to require it; for a ſentence there muſt have been, and he was bound to know what that ſentence was. But he, it ſeems, remained in utter ignorance till the error was pointed out to him by Captain *Campbell*. I do not by any means intend to ſay, that the agent has been actuated by any corrupt motives (for it is quite impoſſible to attribute to him any corrupt motive whatever, the money being entirely out of his poſſeſſion, and remaining in the regiſtry without any knowledge on his part that any ſuch money exiſted); but it is at the ſame time equally impoſſible to acquit him of extreme inattention and negligence: and if the Court had the power of laying the burthen on the agent, it would in this caſe have done it without diſſatisfaction. Under the preſent prize-act, I think the Court would have the power to compel payment by the agent; but on reference to dates, I find this to be a tranſaction prior to that act. The Court then, unfortunately, has not the power; and if the agent cannot be fixed, I fear the liability muſt reſt on the bail. I have looked into the Chancery caſes, and I find, as far as I can collect them, that a ſurety is not releaſed from his engagement by mere lapſe of time, unleſs where payment was to have been made within a limited period, and the time has been extended by the other parties without his conſent or knowledge. In the caſe of *Niſbet and Smith*, ulterior time was given againſt the expreſs directions of the ſurety, and Lord *Thurlow*, relying upon that ground, held him to be diſcharged. In the later caſe of *Rees* v. *Berrington*, the obligee in a bond had, without

The VREEDE.

Auguſt 9th, 1811.

2 Bro. C. C. 579.

2 Vezey, 540.

The VREEDE.

August 9th, 1811.

6 Vezey, 734.

any communication with the ſurety, taken notes from the principal, and given further time; the ſurety was there alſo held to be diſcharged, upon the ſame ground. In the ſtill later caſe of *Wright* v. *Simpſon*, the Lord Chancellor intimated very ſtrongly, that mere forbearance in enforcing payment on a bond would be inſufficient to releaſe a ſurety from his engagement; and expreſsly ſaid, that "as to the "caſe of principal and ſurety, in general caſes, he "never underſtood, that as between the obligee and "the ſurety there was an obligation of active diligence "againſt the principal; that the ſurety is a guarantee, "and it is his buſineſs to ſee whether the principal "pays, and not that of the creditor." Such is the reſult of all the caſes which I have been able to find upon the ſubject, ſo far as I can underſtand them; and as I have no power of throwing the reſponſibility upon the agent, I am under the painful neceſſity of enforcing payment from the bail; but I ſhall order the attachment not to be iſſued for the ſpace of one month.

LE NIEMEN, DUPOTET.

February 12th, 1811.

THIS was a claim of joint-capture on behalf of *Francis Louis Maitland* Eſquire, the commander, and the officers and crew of His Majeſty's frigate the *Emerald*, to ſhare in the proceeds of this *French* frigate *Le Niemen*, which had been captured on the 6th of *April* 1809, after a very ſevere engagement, by His Majeſty's frigates the *Amethyſt*, Sir *Michael Seymour* commander, and the *Arethuſa*, *Robert Mends* Eſquire commander. Before the capture of the prize, an agreement had been entered into between Sir *Michael Seymour* of the *Amethyſt*, and Captain *Maitland* of the *Emerald*, and the reſpective officers and crews of thoſe ſhips, to ſhare jointly in all prizes that might be captured by either of them; in virtue of which agreement, the captain, officers, and crew of the *Amethyſt* would be entitled to ſhare in any proportion of the prize which might be decreed to the *Emerald*.

Joint-capture, claim of on part of the *Emerald*.—*Amethyſt* and *Emerald* joint-chaſers—ſeparate—*Emerald* loſes ſight of the prize, but continues to cruize *in ſearch*—*Amethyſt* engages—*Arethuſa* comes up and makes the actual capture—Claim of the *Emerald* rejected.

An objection was taken by counſel to the admiſſion of the log-book of the *Amethyſt* as evidence in the cauſe, on account of the agreement which had been entered into to ſhare all prizes with the *Emerald*, upon the ground, that by aſſiſting to eſtabliſh the claim of the *Emerald* ſhe was in fact ſupporting her own intereſt under the agreement.

The Court held the log of the *Amethyſt* to be inadmiſſible as evidence, ſince it went to give a common intereſt to the parties.

It

LE NIEMEN.

February 12th, 1811.

It was then prayed, that the concluſion of the cauſe might be reſcinded, for the purpoſe of having the anſwer of the actual captor.

Court.—I ſhall permit the anſwer of Captain *Mends* to be taken, conſidering it as a fair indulgence to the other party, acting under an erroneous impreſſion of the admiſſibility of the log at the time of waving the anſwer: but I ſhall not go further; I ſhall not admit freſh evidence after publication in the cauſe; much leſs ſhall I permit freſh pleading to be given in at this late hour of the day.

February 26th, 1811.

On a ſubſequent day—JUDGMENT.

Sir *William Scott.*—This is a caſe ariſing on a claim of joint-capture of a *French* frigate, taken on the morning of the 6th of *April* 1809, by the *Arethuſa* frigate, after a very ſevere engagement between the prize and the *Amethyſt*. Both frigates had ſuffered very ſeverely in the action, and were lying in a diſabled ſtate when the *Arethuſa* came up. What would have been the reſult if the *Arethuſa* had not made her appearance at ſo ſeaſonable a conjuncture appears quite uncertain: it is impoſſible to conjecture whether the *Amethyſt* could ever have recovered herſelf ſufficiently to renew the fight, and ſupport the gallant intention of her commander. The *Frenchmen* intimate their belief that they were the victorious party; it remains, therefore, a matter of doubt whether this capture could have been conſummated if it had not been for the opportune arrival of the *Arethuſa*. The brunt of the action was indeed borne by the *Amethyſt*, but the ſurrender was made to the *Arethuſa*, and therefore ſhe, in point of form, is to be conſidered the actual taker.

The

The claim of joint-capture, which is now ſet up, is made by the *Emerald*, which was not preſent at the capture, and of whoſe approximation to the ſcene of action the *Arethuſa* was quite ignorant, and from which, therefore, ſhe could have derived no encouragement. The *French* commanding officer conceived the *Arethuſa* to have been the ſame ſhip (the *Emerald*) which he had ſeen the day before; and this miſtake, though a circumſtance otherwiſe unimportant, tends to ſhew that no intimidation was really occaſioned to the enemy from a ſuppoſition that this frigate was near at hand, and that the intimidation which occaſioned the ſurrender aroſe entirely from the actual and viſible ſtrength of the *Arethuſa*. In the allegation it is ſtated, that "on the fifth day of *April* the *Amethyſt* and "*Emerald* cruiſed in company in the bay to the weſt-"ward of the coaſt of *France*." But this can be conſidered as little more than an accidental junction, no particular bond of aſſociation being impoſed upon them by public authority. It has indeed been thrown into the argument, that the aſſociation was formed between them for the purpoſe of looking out for this very frigate; but that is a fact neither pleaded nor ſupported in proof; it is, therefore, a circumſtance which has no bearing on the caſe, and which for that reaſon I diſmiſs out of conſideration. The allegation goes on to ſtate, that "about eleven o'clock the ſaid day, the "*Emerald* being then nine or ten miles north by eaſt "from the *Amethyſt*, and within ſignal diſtance of "her, a ſtrange ſail was diſcovered from the *Amethyſt* "bearing about ſouth-eaſt by eaſt, and ſtanding to the "weſtward, and diſtant about twelve miles, to which "ſhe immediately gave chaſe, the wind then blowing "from eaſt by north a freſh breeze, and the *Emerald*

"having

LE NIEMEN.

February 26th, 1811.

" having ſoon afterwards obſerved the ſaid ſtrange " ſail, and the *Amethyſt* in chaſe of her, made all ſail " towards them; that, as the *Amethyſt* and the ſaid " ſtrange ſail approached nearer to each other, the " latter, on diſcerning the *Amethyſt* to be a frigate, " hauled to the northward with a view to avoid her; " but almoſt immediately perceiving the *Emerald* to " be in that direction, and knowing her alſo to be a " frigate, ſhe changed her courſe to the ſouth-eaſt, " crowding all ſail to endeavour to eſcape, and was " chaſed by both the *Amethyſt* and *Emerald*; and the " *Amethyſt* having aſcertained that the veſſel they ſo " chaſed was a frigate," (they do not, I obſerve, take upon themſelves to aver whether a *French* frigate or a *Britiſh*) " a ſignal was made to the *Emerald* to that " effect; that at four o'clock the *Amethyſt* had " gained on the chaſe, ſhe being then a-head only " about eight or nine miles, and the *Emerald* ſtill " within nine or ten miles of the *Amethyſt*, and at " ſix o'clock the *Amethyſt* ſtill neared the chaſe, ſhe " being then only diſtant about ſeven or eight miles " ſouth-eaſt; and the *Emerald* had alſo gained upon " the chaſe conſiderably, ſhe being then only about " ſix miles north-eaſt by eaſt from the *Amethyſt*: but " about half-paſt ſeven, the night becoming extremely " dark and ſqually, the ſaid veſſels loſt ſight of each " other; that after the ſaid veſſels loſt ſight of each " other, owing to the darkneſs of the night, the ſaid " *Michael Seymour*, conceiving that the ſaid ſtrange " ſail would continue her voyage to the weſtward, " and avoid the north-eaſt quarter, in which the " *Emerald* had been ſeen in chaſe, he changed the " courſe of the *Amethyſt* more to the ſouthward, in " order to intercept her; and the ſaid *Frederick Louis* " *Maitland*,

" *Maitland*, the commander of the *Emerald*, expect-
" ing alſo that the ſaid ſtrange ſail, being at no great
" diſtance from the *Spaniſh* coaſt, would endeavour to
" eſcape by reſuming her original courſe to the weſt-
" ward, ordered the courſe of the *Emerald* to be
" changed, and it was changed accordingly to the
" ſouth-weſt, in order to intercept her if ſhe ſhould
" eſcape from the *Amethyſt*; that about half-paſt eight
" o'clock the *Amethyſt* again got ſight of the ſaid
" ſtrange ſail running to the weſtward; and the ſaid
" ſtrange ſail, on diſcovering the *Amethyſt*, made all
" ſail to eſcape, on which the *Amethyſt* made the pri-
" vate ſignal to the *Emerald*, and the ſame not being
" immediately replied to, a rocket was let off." Now it is not ſtated for what purpoſe theſe ſignals were made; neither does it appear that they produced any effect, or that in conſequence of them the courſe of the *Emerald* was at all changed. As far as I can obſerve, either in the more authentic evidence of the log, or in the more diſputable evidence contained in the depoſitions of theſe *Frenchmen*, no effect whatever was produced by theſe ſignals. But the fact is, according to the caſe here repreſented, that the *Emerald*, ſeeing the *Amethyſt* in chaſe of a ſtrange ſail, did direct her courſe with a view to the interception of that object, but that in the night ſhe loſt ſight both of the *Amethyſt* and the prize.

The evidence in the cauſe is of two deſcriptions: firſt, the log, of which I have already diſpoſed; the other conſiſts of the depoſitions of perſons on board the captured veſſel. Their evidence has been taken at a very late period, and I do think that it is evidently marked with a ſtrong diſpoſition to ſupport the intereſt of that party by whom the witneſſes are examined.

LE NIEMEN.

February 26th, 1811.

amined. I do not ſay that any thing has been improperly infuſed into the minds of the witneſſes by the parties on whoſe behalf they have been produced; I rather attribute it to that general laxity of principle ſo obſervable in the ſentiments of perſons educated in France in modern times, and which renders their teſtimony, as I have frequent occaſion to remark, very unſatisfactory in point of credit. I muſt obſerve alſo, that many paſſages have been introduced into this examination which are perfectly extra-articulate, and which cannot therefore be regularly received.

The legal grounds on which the claim to ſhare has been attempted to be eſtabliſhed are two.—The firſt is, the chaſe on the preceding day, the *animus perſequendi* during the night, and no dereliction of the chaſe, but a mere deviation of courſe under the hope of attaining the end in a better and more effectual manner.—The ſecond ground is, that the *Emerald* diverted the courſe of the prize, and by ſo doing put her in ſuch a ſituation that ſhe fell into the hands of the two ſhips by which ſhe was captured.

The firſt queſtion is, whether this plea, if ſupported by proof, would eſtabliſh the claim of the *Emerald* to ſhare even with the *Amethyſt*; with the *Arethuſa* ſhe has no privity of intereſt, and the act of the one can in no way enure to the benefit of the other. It is only derivatively through the *Amethyſt* that ſhe can ſuſtain any claim as againſt the *Arethuſa*, and this ſpecies of claim the Court would not be much diſpoſed to maintain, where there was ſuch an entire abſence of actual co-operation. It is ſaid, however, that the *Emerald* muſt be conſidered as acting in conjunction with the *Amethyſt*. The grounds upon which ſhe could by poſſibility have been entitled againſt the

Amethyſt

LE NIEMEN.

February 26th, 1811.

Amethyſt are, that ſhe had joined in the purſuit of the prize the day before the capture, and had not diſcontinued the chaſe. It is, I think, to be collected from the evidence, that the *Emerald* had ſeen the prize the day before, and had uſed her beſt exertions to co-operate, but night comes on, and ſhe neceſſarily loſes ſight of the enemy. It does not appear that there was any particular concert between theſe two veſſels, or any authority directing a co-operation between them. The ſignals that were made did not convey any inſtructions as to the courſes proper to be purſued; there was no common co-operation, except ſuch as the diſcretion of two parties acting ſeparately with a common object in view might produce. I do not mean to ſay, that it is neceſſary that the two ſhips ſhould have purſued the enemy in preciſely the ſame line; it certainly is not neceſſary to conſtitute an unity of chaſe that veſſels ſhould ſail in the ſame or even in a parallel direction. If one veſſel ſhould ſail in one direction and the other in another, with the purpoſe of capturing, that difference of courſe would not neceſſarily defeat unity of purpoſe; if in ſight, certainly not. I accede to the obſervation of the counſel for the party claiming as joint-captor, that a purſuit in parallel, or even oppoſite lines, would not of neceſſity deſtroy unity of operation. What the fact may have been with reſpect to the *Amethyſt* is not clearly eſtabliſhed; it is not, however, inconſiſtent, as far as I can judge, with any thing in the evidence, that ſhe might, even during the night, have retained ſome glimpſe of this veſſel, which had been the object of their common purſuit. The *Emerald* certainly had no ſight, but was left to her own ſpeculation as to what courſe the enemy would take during the darkneſs of the night, in order to elude her

purſuers,

LE NIEMEN. *February* 26th, 1811.

purſuers, and to withdraw herſelf from the probability of falling in with either of them. Why then, what was the *Emerald* doing at this time? I think *cruiſing merely in ſearch*. It became matter of mere conjecture what the courſe of the enemy might be, and the *Emerald*, it turns out, was unfortunate in her conjectures. The truth is, ſhe never came up to the place of action or near to it; ſhe merely ſaw the lights and a rocket, which do not appear in the ſlighteſt degree to have influenced her conduct. She had no knowledge of the engagement, ſhe neither ſaw the flaſhes nor heard the report of the guns; and every ſtep ſhe took was carrying her away from the object of her purſuit, if purſuit it can be called. I am not aware of any caſe on which a claim of joint-capture has been ſupported on reaſons like theſe. Here was, it is true, an *animus perſequendi*, but here was likewiſe an erroneous courſe; and in conſequence of that, the benefit, and I may add the burthen of the conteſt, has been thrown on the *Amethyſt*. It was a ſpeculation, I will not ſay unwiſely undertaken by the *Emerald*, but which has certainly terminated inauſpiciouſly for her intereſt. The caſe of continued joint-chaſing is not made out; what is proved is an office of a ſimilar but inferior kind, it is going *in ſearch*, and not *in purſuit*. I know of no caſe in which it has been held, that a ſhip beginning a chaſe and then diſcontinuing it (for it is a diſcontinuance to change a courſe upon conjecture), is entitled to ſhare as a joint-captor; and it certainly is not, at this time of day, the diſpoſition of the Court to extend the limits of joint-capture.

With reſpect to the other ground on which the claim is attempted to be eſtabliſhed, that the *Emerald* diverted the courſe of the enemy, and threw her into

the

the hands of the *Amethyſt*.—I am not aware of any ſuch principle. It appears to me to be perfectly novel: that It is capable of being abuſed to a very conſiderable extent, the caſes which have been mentioned, I think, clearly prove. Among the inſtances enumerated by the counſel is that of the chaſe of the *French* fleet by *Lord Nelſon*, when he purſued it to the *Weſt Indies* and back, and drove it into the lap of Admiral *Calder*. Another caſe pointed out, is that of the four *French* ſhips flying from *Trafalgar*, and afterwards captured by Sir *Richard Strachan*. A third inſtance, was that of an enemy's ſhip crippled, and left by a *Britiſh* frigate with which ſhe had an action, in a diſabled ſtate, and afterwards taken poſſeſſion of by a ſhip accidentally arriving on the ſpot. In none of theſe caſes was it ever pretended that any but the actual captors were entitled to ſhare. It would indeed be a monſtrous poſition, that every fleet or ſhip which, either by accident or deſign, diverts the courſe of an enemy, and by ſo doing occaſions her capture by a totally diſtinct force, ſhould be conſidered a joint captor. That the poſition or courſe of the *Emerald* had this effect of throwing the prize into the hands of the *Amethyſt*; that it had it excluſively; that ſhe was the ſole agent in the buſineſs, I think by no means clear. No direct evidence in the cauſe eſtabliſhes the fact, that the enemy changed his direction in conſequence of any direct attitude taken by the *Emerald*. That this attitude was taken with any intention of throwing this veſſel into the hands of the *Amethyſt*, is not pretended; it is not aſſerted to have been done with any view of producing that effect, which mere accident ſeems to have produced. It may have happened that, on the ſight of other veſſels, the

LE NIEMEN. enemy changed her courſe, with very little reference to the poſition or the manœuvres of the *Emerald*.

February 26th, 1811. On the whole of the caſe, I am of opinion, that the claim is not ſuſtainable againſt the *Amethyſt*; that if ſuſtained it would produce great and manifeſt injuſtice to the *Arethuſa*. As againſt the *Arethuſa*, then, I have no heſitation in rejecting the claim. If there is any private agreement between the officers and crew of the *Emerald* and of the *Amethyſt*, the parties will have the benefit of that agreement.

February 12th, 1811.

LA BELLE COQUETTE, ANDRIEUX.

JUDGMENT.

Joint-capture, claim of on part of ſhip lying in the harbour of *Corunna*, and diſpatching her boats in ſearch of a *French* ſchooner, denoted by the ſignal poſt to be hovering on the coaſt.—Fact of ſight not ſufficiently proved.—Conſtructive aſſiſtance by boats will not entitle the ships to which they belong to ſhare in the prize.—Claim rejected.

SIR *W. Scott*.—This queſtion ariſes on a claim of joint-capture aſſerted on behalf of His Majeſty's ſhip *Tonnant*, which was lying in the roads of *Corunna* at the time when the capture of this *French* ſchooner took place, and had diſpatched her boats in purſuit of the prize. It appears that the *Tonnant*, with many other of His Majeſty's ſhips, were lying in the harbour, under the command of Admiral *De Courcy*; and although no appearance has been given on their behalf, their non-claim will not, I think, exclude the *Tonnant*, even if the circumſtances on which ſhe founds her claim belong to her in common with the reſt of the ſquadron, and ſtill leſs if they are peculiar to herſelf. At the ſame time I muſt ſay, that it tends to throw ſome degree of doubt upon the caſe, where a claim ſo founded is advanced by this ſhip alone; becauſe every circumſtance connected with it muſt, in all probability,

LA BELLE COQUETTE.

February 12th, 1811.

have been as entirely in the poſſeſſion of every other veſſel in the harbour as in that of the *Tonnant*. The fact, that notice was given from the *Spaniſh* ſignal-poſt that an enemy was hovering on the coaſt, would naturally give the alarm and excite general attention in the fleet; and when I find no other ſhip coming forward to aſſert a claim, it certainly makes the demand for evidence of ſight on the part of the *Tonnant* ſtronger than it would otherwiſe be. I muſt obſerve alſo, that the orders of the admiral to Lieutenant *Dickenſon*, of the *Nonpareil* ſchooner, rather ſeem to diſclaim the fact of ſight by the *Tonnant*. "Put yourſelf under the "command of Lieutenant *Griffith Allen*, who is de-"tached with the boats of His Majeſty's ſhip *Tonnant* "*in ſearch* of a *French* ſchooner, which is *denoted by* "*the ſignal-poſt* to be hovering on this coaſt." It is hardly poſſible, I think, that the orders of Admiral *De Courcy* would have been conveyed in theſe terms, if the enemy had been ſeen by the men on board the *Tonnant*: and when I find the admiral, who muſt in every point of view be conſidered as perfectly diſintereſted, expreſſing himſelf in this manner, and no other ſhip coming forward to aſſert a claim, the ſtrongeſt poſſible evidence is required to demonſtrate the fact that the *Tonnant* was in ſight. I cannot take the evidence of mere releaſing witneſſes as eſtabliſhing the fact of ſight in oppoſition to the abſence of all claims from any other ſhips belonging to the ſquadron, and in oppoſition alſo to the manifeſt tenor of the deſcription given by the admiral himſelf. It is ſaid, that releaſing witneſſes may be heard to particular facts, though they cannot be admitted to prove the whole caſe; but ſurely not to the fundamental fact which would alone be ſufficient to prove the whole

La Belle Coquette.

February 12th, 1811.

case. Supposing, however, the fact of sight to have been proved, I am by no means clear that, under the peculiar circumstances of the present case, the ships being all moored, and therefore incapable of proceeding in immediate pursuit, that the fleet would be entitled to share. The present case differs very materially from that of a moving squadron, sending forth such a portion of its force as is thought sufficient for the object it may have in view.

There being a failure in the proof that the prize was seen from on board the *Tonnant*, her claim must necessarily depend upon the fact of the capture having been actually made by her boats. The first thing to be done then is, to establish the interest of the boats. Constructive assistance by boats cannot entitle the ships to which they belong to share in the prize, though actual capture by the boats would be sufficient for that purpose, for they are a part of the force of the ship. But in cases of mere constructive assistance, the right of participation must be in proportion to the quantum of intimidation caused, and cannot go beyond the force actually seen by the enemy. How far the seamen composing the crews of these boats were provided with the means of subduing a vessel of this force, does not appear; we all know the active valour of that class of men in finding expedients under all possible circumstances, and I presume that they had arms of some description or other with them. But how stand the facts of the case, as disclosed by the evidence? Four boats belonging to the *Tonnant* are dispatched in search of the enemy; they are supported by two schooners, one of which formed a part of the original squadron, and the other, though it happened by accident only to be on the spot, yet, by the practice of the navy,

LA BELLE COQUETTE.

February 12th, 1811.

navy, became ſubject for the time to the orders of the admiral. The boats, however, were under the neceſſity of returning many hours before the capture took place, being unable to proceed on account of the wind and weather;—not as happened in the caſe the other day before the Court of Appeal, where one veſſel quitted merely becauſe ſhe ſaw the other was of ſufficient force to enſure the capture without aſſiſtance. It is clear, therefore, that they are in no way to be conſidered as actual captors; they can convey no intereſt to their ſhip; and they are themſelves not entitled upon the ground of conſtructive aſſiſtance, ſince they had relinquiſhed the chaſe, and returned to the harbour before the capture took place. The caſe then is reduced to this, that one of theſe boats put ſome of her men on board the actual captor, and as part of the crew *pro tempore* of that ſhip, they are entitled to ſhare, but not as part of the crew of the *Tonnant*. The claim of theſe men is admitted; but I have no heſitation in deciding, that thoſe who remained in the boats of the *Tonnant* are not entitled to to ſhare, and *a fortiori*, that the *Tonnant* herſelf can have no intereſt in this capture.

February 14th, 1811.

SEE REUTER, LANGE.

The Court in general declines to interfere in a cauſe of poſſeſſion between foreigners, without conſent of the parties or ſanction of the repreſentative of the foreign ſtate. —Here the ſentence of a foreign court equivalent. —Veſſel decreed to be delivered up on bail to anſwer the maſter's intereſt.

THIS was a proceeding inſtituted on the behalf of a majority of the owners of this veſſel, for the purpoſe of diſpoſſeſſing the maſter, who was alſo a part-owner. It was the caſe of a *Roſtock* ſhip, which had been arreſted by the authority of this Court, at the inſtance of Mr. *Henry Martens*, the attorney and agent of ſeveral perſons reſident at *Roſtock*, aſſerting themſelves to be the proprietors of fourteen ſixteenth ſhares of this veſſel. The maſter appeared, but under proteſt denying the juriſdiction of the Court, and aſſerting himſelf to be the owner of five ſixteenths of the veſſel, inſtead of two ſixteenths, as alledged by the principal owners.

On behalf of the maſter and part-owner, *Jenner* contended, that the warrant of arreſt ought to be ſuperſeded, becauſe the Court had no authority to decide on the law of the country to which this veſſel belonged; that the preſent caſe did not depend upon a queſtion of the law of nations, but upon the municipal law of the city of *Roſtock*; that in the caſe of the

Edw. Rep. 242. *Hamburg* ſhip the *Johan and Siegmund*, the Court had refuſed to proceed to diſpoſſeſs the maſter on the application of the owners of fifteen ſixteenth ſhares; that it was not competent to the Court to entertain a cauſe of poſſeſſion between foreigners without the conſent of the parties, or of the accredited miniſter of the country in which the parties were reſident.

On

The
SEE REUTER.

February 14th
1811.

On the part of the principal owners *Swabey* argued, that the Court was bound to interfere to prevent a failure of juſtice; that the ſentence of the Court of Admiralty at *Roſtock*, which was now produced, was equivalent to the conſent given by the repreſentative of a foreign ſtate.

JUDGMENT.

Sir *W. Scott.*—In caſes of ſhips belonging to *Britiſh* ſubjects, the Court has no heſitation in ordering poſſeſſion to be delivered up, on the application of a majority of the owners, without entering very minutely into the cauſes of diſſatisfaction exiſting between them and the maſter. If there be any caſe where *Britiſh* intereſts are not concerned, that would juſtify the interference of the Court. It is a caſe ſimilar to the preſent, where the maſter refuſes to return to the ports of that country to which all the parties belong, and where the queſtion between them might with the greateſt propriety be decided. I think it is a very powerful ingredient in this caſe, that the maſter has detained this ſhip five years together in foreign ports, and ſtill refuſes to return to *Roſtock* to abide the deciſions of the Court there, though called upon by a large majority of the owners ſo to do. At the ſame time, it is with the greateſt reluctance that this Court takes up queſtions of this kind where foreigners are alone concerned. Theſe are queſtions which do not properly belong to the *jus gentium*, but depend on the municipal regulations of different countries, with which this Court can be but very imperfectly acquainted. The Court, therefore, is very unwilling to enter upon ſuch queſtions; and has never, I believe, entertained ſuits of this kind, unleſs the caſes have been referred to

The SEE REUTER.

February 14th, 1811.

its deciſion by the conſent of parties, or by the intervention of the repreſentative of the foreign ſtate devolving the juriſdiction of his own country on this Court. The queſtion is, whether the authority which is here produced can be conſidered as equivalent to the conſent of an accredited agent. Here is a judicial order or decree by the burgomaſters and counſellors of the city of *Roſtock* in ſenate aſſembled, and in whom the Admiralty juriſdiction of that city is ſaid to be veſted, directing the maſter to deliver up the poſſeſſion of the ſhip to Mr. *Martens*. This document, officially ſubſcribed by the prothonotary of *Roſtock*, is given under the ſeal of that city, and its authenticity is not denied on the part of the maſter. I am of opinion that this inſtrument arms this Court with ſufficient authority. Here is an order of the Court at *Roſtock*, that this ſhip ſhall be given up to the repreſentative of the owners; this is a poſitive declaration of the law by the proper tribunal, and I think that I am bound to ſupport the ſentence *mutuæ viciſſitudinis obtentu*. I ſhall decree this veſſel to be given up on bail to anſwer the maſter's intereſts.

POMONA, M'NAUGHT.

February 14th, 1811.

JUDGMENT.

Proceeds of Prize may be followed wherever they can be traced.—Monition enforced againſt perſons who were at the time or had been in poſſeſſion of prize goods. 45 G. 3 c. 72.

SIR *W. Scott.*—This is an application to the Court, to enforce a monition againſt certain perſons who have had the proceeds of prize in their hands, knowing them to be ſuch. It is a principle recognized in theſe as well as the common law courts, that the proceeds of prize may be followed wherever they can be traced. The act of parliament does not introduce a new principle in its proviſion for this purpoſe, but merely gives to this Court a ſtronger arm in ſupporting the rights of Captors; and it will not be the diſpoſition of the Court to abridge its powers where they are neceſſary to protect thoſe rights. The goods, out of which the proceeds now ſought to be recovered ariſe, were put on board this ſhip at *Port-au-Prince*, in *St. Domingo*, and were captured and carried into the iſland of *Jamaica*. A claim was given for them by the maſter, as the property of Meſſrs. *Geddes* and Company, of *London*, merchants; and the goods were delivered up upon bail being given by Mr. *Smith*, of *Kingston*, in *Jamaica*, to anſwer adjudication. The goods were afterwards condemned as prize to the captors by the Vice-admiralty Court in that iſland, from which ſentence of condemnation an appeal was aſſerted; but not having been proſecuted within the time limited by law, it was pronounced to have been deſerted by the Lords Commiſſioners of Appeal. I am, therefore, now to conſider theſe goods as undoubted prize, determined to be ſuch by a competent tribunal,

The POMONA.

February 14th, 1811.

tribunal. Whether Mr. *Hunter* or any one elſe had any thing to do with theſe goods originally, is quite out of the view of this Court: it can look no further back than to the period of their condemnation. It appears that the goods were condemned by the Vice-admiralty Court at *Jamaica*, and delivered to *Smith*, as agent of the claimants; they come into his hands as prize-goods, and the clauſe of the act of parliament was meant to include every perſon receiving goods in that character. Where goods have been fairly purchaſed in market overt, under a total ignorance of their previous hiſtory, the captor might find ſome difficulty in enforcing a proceſs againſt the purchaſer; but here Mr. *Smith* was aware of the fact; he takes the goods with this reſponſibility, and he is, therefore, directly amenable to the Court. New bills of lading were made out at *Jamaica* to the order of *Smith*: he is clearly fixed with the poſſeſſion of the proceeds, and he aſſigns them over by his agents to *Hunter* and Company, by the ſame title by which he had himſelf holden them. They have the bills of lading, and take poſſeſſion of the property with a perfect knowledge of the hiſtory attending it. Every particle of the evidence in the cauſe tends to fix them with the knowledge of their being prize-goods. They go further, and ſpecially charge themſelves with reſponſibility to the captors by giving a bond of indemnity to *Smith*. It was not indeed in their power to diſcharge Mr. *Smith*, but they could and did make themſelves peculiarly anſwerable. A great deal has been ſaid as to the want of equity in proceeding againſt theſe parties and not againſt Mr. *Smith* only. But when equity is ſpoken of, I would aſk, by what kind of equity do theſe perſons bind themſelves down to reſponſibility

The POMONA.

February 14th, 1811.

reſponſibility and obtain poſſeſſion of the goods, and when that poſſeſſion has turned out not beneficial, then endeavour to throw the *onus* upon the other party? That they had the poſſeſſion of theſe goods, is perfectly clear; whether they transferred them again to ſuit any purpoſes of their own, is perfectly immaterial. It will not avail them to ſay, that they have not now poſſeſſion of the proceeds; all the poſſeſſion that has been had of the goods ſince, has ſprung and ariſen from their poſſeſſion; the poſſeſſion of other parties is their poſſeſſion as derived from them. Whether the parties to whom they transferred the goods received them with a knowledge of the fact that they were prize proceeds, does not appear; if they received them without ſuch knowledge, then, undoubtedly, the captors have done right in paſſing them by, and in proceeding as they have done againſt Meſſrs. *Hunter* and Company. The captors have made their election, and they had a perfect right ſo to do. Upon every principle, I think the parties who have been proceeded againſt are reſponſible for the amount of the proceeds; and I ſhall therefore decree the monition as prayed againſt Mr. *Smith*, and alſo againſt Meſſrs. *Hunter*, *Raynie*, and Company.

March 30th, 1811.

BUENOS AYRES.

JUDGMENT.

Joint-capture—Claim of on behalf of H. M. S. Leda, ſent forward to the coaſt of South America to obtain information before the expedition to Buenos Ayres had been finally reſolved upon—Quitting the ſtation before the armament arrived—and returning ſix days after the capture of that ſettlement—not entitled in virtue of antecedent or ſubſequent ſervices.

SIR *William Scott*.—This is a proceeding originating in the capture of the *Spaniſh* ſettlement of *Buenos Ayres*. A claim is ſet up by Captain *Honeyman*, and the other officers and crew of His Majeſty's ſhip the *Leda*, to ſhare as joint-captors in the proceeds of the property captured at that ſettlement. The matter comes before this Court on reference from a committee of His Majeſty's Council, who, upon application being made to them by Captain Honeyman, ſignified their opinion, that it was a queſtion proper to be ſubmitted to the Court of Admiralty; and, as His Majeſty's proctor has conſented to appear, I ſee no reaſon why I ſhould decline to entertain the cauſe.

Two or three points, not very material to the merits of the queſtion, have found their way into the caſe: one of theſe is the queſtion of juriſdiction, which has already been diſpoſed of. It has been uſual of late to introduce a clauſe in the grant, appointing certain officers of elevated rank, who have themſelves been concerned in the capture, to act as truſtees for the diviſion of the property which may be captured, and as arbitrators of any diſputed claims that may ariſe; and their deciſion is conſidered as binding and final, unleſs it ſhould be reverſed by an order from the King. It is not for me to ſay how far this is a convenient mode of proceeding; it ſeems at leaſt liable to ſuſpicions of error, and even perhaps of ſome partiality. It muſt be intended that the deciſions ſhould be made in conformity to known and fixed principles of law; and theſe principles

March 30th, 1811.

ciples of law are contained in the decisions of this Court and the Court of Appeal, with which it is almost impossible that the trustees should be personally and accurately acquainted. In what way these principles of law are to travel to the minds of these gentlemen, unassisted with legal advice, or how they are to steer their way through the difficulties which may occur, it is not easy to say. Their determinations must, of necessity, sometimes occasion dissatisfaction to the parties interested, to whom no right of appeal is given. His Majesty has indeed preserved the right of control; and may, if he pleases, *ex mero motu*, or upon petition from any of the individuals interested, take the matter into his consideration, but he is not bound so to do. He may be disinclined to vary the decisions made by the officers, from unwillingness to disturb the harmony which ought to subsist in the service. On these grounds, it may possibly be matter of doubt whether such a course of reference is that which is likely to be generally satisfactory. In the present case three trustees were appointed, by a majority of whom all cases in which any doubt might arise were to be decided: now it so happened, (and it will not unfrequently happen where referees of this description are appointed,) that two out of the number were absent on the public service at the time their assistance was required; it was impossible, therefore, or at least highly inconvenient, to convene them for the purpose of deciding on Captain *Honeyman*'s claim. What was to be done in this emergency? Application was made, and in my opinion very properly made, to the Crown, by a memorial, which was referred to the Privy Council, and by that body to the Court of Admiralty. I see no reason why this Court should reject this devolution of authority: very great

inconvenience

BUENOS AYRES.

March 30th, 1811.

inconvenience would result from such a refusal on the part of the Court, and I know of no inconvenience that can arise from the discussion of the question in this place. If the Court should now refuse to decide the case, Captain *Honeyman* must either lose altogether the benefit of a decision upon his claim, or he must commence other proceedings *de novo* at some future time, and at a renewed expense. Upon every ground, therefore, of delegated authority, and of abstract propriety, I think I am bound to entertain the question.

There is also another circumstance which I must notice, since it has been contended to be prejudicial to the claim of Captain *Honeyman*; *viz.* that his name is omitted in the grant. But I am of opinion that this omission is not material. It is a grant from the Crown, not through the Privy Council, but through the Secretary of State; and he of course does not examine very minutely into the merits of the persons claiming. It is not usual to mention any names whatever in the grant, and it has only been done in the present case, because it was apprehended that Sir *Home Popham* might lose his right to share as captain of a ship unless specifically named, in consequence of his absence from his ship and his assumption of higher rank. The name of Captain *Honeyman* is certainly not introduced; but if he was employed in the expedition, his interest was vested before by the prize-act, and the mere omission of his name would not affect his claim. The Council does not take upon itself to determine facts of that nature; and the Royal Grantor having declared by a reference to the decision of this Court, that the form of the thing should not withstand the substantial justice of the case, I do not consider this circumstance as militating against the claim of Captain *Honeyman*.

There

March 30th, 1811.

There are ſome circumſtances ſtated on behalf of Captain *Honeyman*, which I may alſo throw out as immaterial. Of this kind are the enquiries made by the clerk of the Council, whether Captain *Honeyman* had any objection to the claims of certain other individuals, thereby admitting that Captain *Honeyman* was a perſon having himſelf an undoubted right. But the act of the clerk of the Council can never be conſidered as an admiſſion on the part of the Council or of the parties intereſted; this cannot give Captain *Honeyman* a title, nor veſt in him any rights to which he would not otherwiſe be entitled. I may alſo leave out of my conſideration the ſtatement, of his having releaſed ſeveral veſſels upon the coaſt, which might have turned out valuable prizes to himſelf. He was employed in a public ſervice of a ſecret nature; and the detention of theſe ſhips which he had ſeized would have been inconſiſtent with the execution of the duty impoſed upon him. His conduct in thus forbearing, upon public grounds, to purſue his private intereſt, was certainly very proper and commendable; but it has very little bearing on the preſent queſtion; it does not make him a party in the expedition.

Putting aſide theſe preliminary remarks, I now come to the ſubſtance of the caſe. Before the original expedition to the *Cape of Good Hope* ſailed from the ports of this country, Sir *Home Popham* had received directions from the Admiralty, to ſend a frigate to cruiſe on the eaſtern coaſt of *South America*, between *Rio de Janeiro* and *Rio de la Plata*, for the purpoſe of procuring intelligence of the enemy's motions. As ſoon as the object of the expedition was accompliſhed, by the capture of that ſettlement, he, in purſuance of the orders thus previouſly communicated to him, diſpatched the *Leda*,

BUENOS AYRES. *Leda*, under the command of Captain *Honeyman*. Connecting theſe circumſtances together, it cannot be denied that Captain *Honeyman* was ſent under orders originating with the Admiralty itſelf; and alſo that he was diſpatched *with a view* to the expedition, though there was no *fixed determination* to make an attack upon *this Spaniſh* ſettlement. The original orders of *April* manifeſtly ſhow, that operations againſt *Buenos Ayres were entirely in ſpeculation, and not finally decided upon*; for what are the terms of the orders?—

March 30th, 1811.

" Whereas there are ſeveral propoſitions in agitation " with reſpect to our operations *off* or *in* the *Rio de la* " *Plata*, on the eaſt coaſt of *South America*, all entirely " dependant on the intelligence we have received, " the intelligence we may receive, and the known " views of His Majeſty's government towards that " country, you will therefore proceed there in His " Majeſty's ſhip under your command." Information is declared to be wanted with regard to the ſtate of *Maldonado*, *Monte Video*, and *Buenos Ayres*, in order that it might be decided whether a predatory excurſion only, or an attack having in view a permanent poſſeſſion of the country, ſhould take place. Neither the locality nor the character of the expedition at that time was determined; and it appears moſt evident, from the affidavit of Sir *David Baird*, that it was not till after the *Leda* had ſailed that his conſent as military commander was given, or that the expedition was finally reſolved upon. Such evidence fixes theſe facts beyond controverſy; and therefore the *Leda* could not be conſidered at the time of ſailing as an agent in that ſpecial expedition. The original orders, it appears, were communicated to the *Leda* on the 3d of *April*; and ſhe ſailed from the Cape on the following

day. Subſequent orders were ſent out by the *Encounter* gun-brig on the 21ſt of *April*; but theſe orders, it appears, were never received; for Captain *Honeyman*, though he aſſerts the receipt of the firſt orders, does not venture to ſay that he received the ſubſequent ones; and, therefore, whatever might have been the purport of thoſe orders, or in what way ſoever they might have been pointed to this expedition, they are quite foreign to the merits of this caſe, being orders which he never received, and therefore never acted under. On the 15th of *May* the *Leda* arrived off the *Rio de la Plata*, and continued cruizing on the coaſt of *South America* till the 30th of that month, when ſhe went to *St. Catherine's* in order to obtain water and proviſions. At *St. Catherine's* ſhe was detained, owing to the perverſeneſs of the *Portugueze* governor, or ſome other cauſe, till the 30th of *June*, and did not arrive again at the *Rio de la Plata* till the eighth of *July*; the ſurrender of *Buenos Ayres*, and the capture of the treaſure, which is the ſubject of the preſent conteſt, having taken place on the ſecond of that month, ſix days previous to the arrival of the *Leda*.

BUENOS AYRES. *March* 30th, 1811.

The queſtion is, whether upon any general principle the ſervices antecedently performed by the *Leda* are of a nature to give her an intereſt in the capture. I am of opinion that they are not; that the ſervices previouſly performed by her, however meritorious they may have been, will not entitle her to ſhare, ſince there was no preconcert, and no ſpecific knowledge of the expedition till after the capture was effected. Upon any general principle of joint-capture, or on the authority of decided caſes, I am clearly of opinion that the claim of the *Leda* cannot be eſtabliſhed; and it certainly is not the diſpoſition of this

BUENOS AYRES.

March 30th, 1811.

Court, or of the Lords Commiſſioners of Appeal, to extend the intereſts of joint-capture beyond their preſent limits.—So, likewiſe, with reſpect to ſervices ſubſequently performed, they muſt be conſidered preciſely in the ſame light; I think I may lay it down as a certain and fixed rule, that no ſervices antecedent or ſubſequent, unleſs the veſſel is employed in the identical ſervice of the expedition, will impart a prize-intereſt. If, therefore, I had to diſpoſe of this caſe on principles of law, I ſhould have no heſitation in pronouncing againſt the claim of the *Leda*.

But the matter has been put upon other grounds.—I am told to remember, that the ſame truſtees allowed another ſhip to ſhare againſt the *Leda* under preciſely ſimilar circumſtances; and I do think that a mutuality in this reſpect is of the very eſſence of juſtice. That may be a very good ground for a ſet-off between the parties, on a matter which was in itſelf originally a very unjuſt demand; and if it could be ſhown that ſuch a claim had been ſuſtained againſt a party, I think that he would be entitled, upon a principle of reciprocal juſtice to have the ſame rule applied in his favour. But, then, the rule muſt be obſerved with certain limitations: it muſt be ſhown that the caſes were perfectly parallel, that they were ſimilar in all their material facts and circumſtances; and it muſt alſo be ſhown that the parties had acquieſced in the determination. The caſe particularly alluded to was that of the *Norriſſus*; and it was maintained, that upon the ſame grounds on which Captain *Honeyman* now reſts his claim the *Norriſſus* was pronounced to be entitled. But I will conſider how far the parties now before the Court have acquieſced in that deciſion. The gentlemen oppoſing the admiſſion of the preſent claim are the

March 30th, 1811.

the officers of the army, and one of the captains of the navy, who were employed on the expedition. The deciſion was made by the truſtees, and to this deciſion theſe gentlemen were not parties. Then how is their acquieſcence ſhown? In this court, indeed, as in other courts of law, the parties are preſumed to acquieſce unleſs they appeal from the ſentence; but theſe gentlemen had no right of appeal—*non conſtat* that they did acquieſce; or if they did, it muſt be conſidered as a mere involuntary acquieſcence in that for which they had no remedy.—I ſay, in ſuch a caſe it cannot have the effect of a legal acquieſcence. His Majeſty may, *ex mero motu*, interfere or not; but there is no right of appeal given. It might be, that an act even of injuſtice was committed in that caſe; but it would be very hard to hold the parties to an acquieſcence in that which they could not help, and to conſider one act of injuſtice as an authority for another.

I come, now, to conſider the paralleliſm of the two caſes; and I muſt ſay, that the caſes are very diſſimilar in their circumſtances. The *Narciſſus* is much more intimately and directly connected with the armament ſent againſt the Cape than the *Leda* is with the preſent expedition: ſhe ſails from this country with a perfect knowledge of the operations which were to be undertaken, when the object of attack was fixed upon, and a communication made to herſelf and all the other veſſels with whom ſhe was aſſociated in that ſervice. From the *Madeiras* ſhe is diſpatched for the purpoſe, and the ſole purpoſe, of forwarding the ſpecific expedition, with an officer of high rank, and of great expected utility in the conduct of the attack. She arrives at the ſcene of action, though not upon the preciſe

BUENOS AYRES.

March 30th, 1811.

ſpot where the execution of the project is carried into effect; becauſe it was her duty to be cruiſing about at a diſtance. She ſails about, purſuant to her orders, and ſhe comes up the day after the ſurrender of *Cape Town*, and before the military operations have been entirely diſcontinued. Surely that caſe cannot be aſſimilated to the caſe of a veſſel ſailing without a certain knowledge of the ſpecific expedition, and without any preciſe orders for aſſociating herſelf with that expedition. I think theſe caſes are as diſtinct as it is poſſible for caſes to be: here was a total ignorance in one caſe, and a full knowledge in the other. The *Narciſſus* was legally to be conſidered as employed in the expedition; but I do not think, either upon the general principle, or upon the particular caſe of the *Narciſſus*, Captain *Honeyman* is ſo entitled; and upon theſe grounds I pronounce againſt the claim of the *Leda*.

The Court recommeuded, but did not direct, the expences of Captain *Honeyman* to be paid out of the proceeds.

MADONNA D'IDRA, PAPAGHICA.

April 30th, 1811.

Mariners wages take precedence of bottomry bonds—Subſiſtence part of wages—In caſes of Greek navigation mariners to be ſubſiſted ti conveyed back to their own country.

THIS was the caſe of a *Greek* veſſel, which brought a cargo of cotton, wool, and fruit, from *Smyrna* to *London*, where ſhe arrived in *February* 1810, and diſcharged her lading. In the month of *May*, in the ſame year, a warrant was iſſued to arreſt the ſhip, at the ſuit of Mr. *Hanſen*, of *London*, the holder of two bottomry bonds. A memorial having been preſented to the Earl of *Liverpool*, one of the ſecretaries of ſtate, by twenty-five of the mariners, part of the crew of this ſhip, ſtating that they had been defrauded of their wages by the captain, and were left deſtitute of ſupport, the King's proctor received directions from the ſecretary of ſtate's office to take ſuch ſteps as might be requiſite to recover the wages due to the memorialiſts who were, in the mean time, furniſhed with the means of ſubſiſtence, and afterwards ſent to their own country by His Majeſty's government. In conſequence of the directions thus received, the King's proctor intervened in the cauſe on behalf of the mariners. Mr. *Hanſen*, the holder of the bonds, and conſignee of the cargo, conſented to pay the wages due to theſe men, but declined to defray the charges incurred for their ſubſiſtence. The ſhip was ſold under a decree of the Court, and the proceeds brought into the regiſtry, but the amount was not ſufficient to ſatisfy the demands of the mariners and of the bond holder.

On behalf of the mariners it was contended, that they were entitled to priority of payment, and that the

The MADONNA D'IDRA.

April 30th, 1814.

money expended for their maintenance ought to be defrayed out of the proceeds of the ſhip in the firſt inſtance; and if that ſhould prove inſufficient, then out of the freight which was in the hands of Mr. *Hanſen*.

On the other ſide it was ſubmitted, that the proceeds of the ſhip ought to be applied in payment of the bottomry bonds, in preference to all other demands, the wages having already been paid.

JUDGMENT.

Sir *W. Scott*.—This is one of thoſe caſes which are almoſt unavoidably involved in conſiderable myſtery, and attended with great confuſion and embarraſſment upon the queſtion of law ariſing on the facts, taking them to be aſcertained; for it is a queſtion of *Greek* navigation, which muſt depend in a great degree upon the cuſtoms and regulations of a foreign country, the exact ſtate of which it is extremely difficult to aſcertain. I may add, likewiſe, that it is a caſe in which the Court finds it by no means an eaſy taſk to obtain a correct and ſatisfactory ſtatement of facts.

It appears that the ſhip ſailed from *Smyrna*, at which place the maſter had taken up money on a bottomry-bond; that in the courſe of her voyage ſhe had put into *Malta*, where the maſter again procured money by means of another bond; and that ſhe had ſince arrived in the port of *London*. What may be the original ground of diſpute between the maſter and the crew *non conſtat*. No reaſon has been aſſigned for the quarrel, ſo that I am totally at a loſs to diſcover what has led to it. The Court cannot find out which of the parties is the wrong-doer; whether there is cauſe of forfeiture of wages on the part of the mariners, or whether

The MADONNA D'IDRA.

April 30th, 1814.

whether the miſconduct of the maſter ſhould entail any inconvenience on his owners.

It appears, that after the arrival of the ſhip in this country, Mr. *Hanſen*, of this town, with perfect propriety, took out a warrant to arreſt this ſhip, in order to obtain payment upon the bottomry bonds; and that a quarrel aroſe between the maſter and crew, which led to the probability that the ſhip might be left here in a ſtate of diſtreſs. The ſhip has ſince been ſold, under the directions of this Court, and the proceeds of the ſale have been brought into the regiſtry. In the mean time the ſailors applied and proceeded for their wages in the courts of common law, in twenty-five ſeparate actions; I do not ſay in an oppreſſive manner, for it was the only way in which they could there proceed: it is only in this Court that the mariners can combine their actions. The crew afterwards intervene in the ſuit carried on by Mr. *Hanſen* in the Court of Admiralty, not exactly in the regular manner; but the Court does not expect it of ſuch men, who are in an eminent degree *inopes conſilii*. The court would to ſuch ſuitors give every relief in its power, by departing from forms, as far as is conſiſtent with the juſtice due to others, eſpecially where the Crown has intervened for the protection of the parties.

Mr. *Hanſen* has, by his act in paying the wages ſchedulate, waved all objection to the informality of the proceedings; and the queſtion now is, whether the money remaining in his hands ſhall be anſwerable for the ſubſiſtence of theſe mariners, or whether the crown ſhall be left loaded with the ſupport of them. Mr. *Hanſen* has in his poſſeſſion, and will retain, a larger ſum than will be ſufficient to ſatisfy any demands of his own: he will, at all events, ſuffer no derogation

The MADONNA D'IDRA.

April 30th, 1811.

of his own rights, and is concerned only on behalf of his employers, the holders of theſe bottomry bonds. The queſtion is, whether he, as the agent of the bondholders, has a right to retain this money as againſt theſe mariners, or againſt the Crown, which ſtands in their place. Now, it muſt be taken as the univerſal law of this Court, that mariners' wages take precedence of bottomry bonds. Theſe are ſacred liens, and, as long as a plank remains, the ſailor is entitled, againſt all other perſons, to the proceeds as a ſecurity for his wages. This is a principle univerſally admitted; and whoever enters into a contract, or advances money upon bottomry, muſt be preſumed to do it with a full knowledge of the law upon this point. But, then, is the ſubſiſtence of theſe men to be conſidered as part of their wages? I think it is ſo to be conſidered; it is wages paid in another form, it is part of the compenſation for their labour; and, according to the law of the country to which theſe men belong, ſubſiſtence in the intermediate time muſt be preſumed to form part of the contract for the payment of wages. The parties muſt be ſubſiſted till the return to their own country, unleſs ſome ſpecial reaſon is ſhown to the contrary, ſuch as deſertion, or any kind of miſconduct, which would work a forfeiture of wages. There is, indeed, no proof of any ſpecial agreement upon this point in the preſent caſe; but it is very material that ſuch a covenant ſhould be preſumed to ſubſiſt between the parties, eſpecially in a caſe, like the preſent, of *Greek* navigation. The number of *Greek* veſſels which arrive in this country is very ſmall; and the mariners, from the peculiarity of their language and habits, if diſcharged in *England*, could not, without extreme difficulty, find an opportunity of returning to their own country.

The MADONNA D'IDRA.

April 30th, 1811.

country. But the Court is not left ſolely to its own conjectures, as to what may be the eſtabliſhed uſage with reſpect to the ſubſiſtence or the diſmiſſal of mariners employed in the navigation of *Greek* veſſels. It is ſworn by a perſon, who ſtates himſelf to have been for twenty years captain of an *Ottoman* veſſel, and at preſent the conſul-general of the Sublime Porte reſident in *Great Britain*, that "the captain is bound by the "cuſtomary regulations of *Turkey* to take his men "back again in his veſſel, or to find them conveyance "in other veſſels; and that in caſe of ſale of the veſſel "in this country, the proceeds thereof are liable for "the ſupport of the crew, and to procure them the "means of conveyance to their own country." This, I think, effectually diſtinguiſhes the preſent caſe from the *American* caſes which were lately before the Court. The *American* ſeamen did not there attempt to eſtabliſh their right, as due to them by the univerſal uſage and cuſtom of their country, or as forming part of the contract under which they ſailed, but upon the ground of a ſtatute lately introduced. As the demand was made upon a mere legiſlative act of that country, the Court declined to interfere, but it held there, that if the ſubject matter in diſpute between the parties had formed part of the contract, it would have upheld the demand. I ſhall, therefore, conſider the proceeds as anſwerable for the ſubſiſtence as well as the wages of theſe mariners; but I ſhall not meddle with the freight which is in Mr. *Hanſen*'s hands.

May 14th, 1811.

EL RAYO.

In a general engagement the whole fleet is entitled to head money, though the formal surrender be made to one ship only — Circumstances taking the present case out of this rule. Actual contribution of assistance necessary to entitle a joint-captor to share in head-money.

THIS was the case of a claim set up on the part of His Majesty's ship *Leviathan*, to share in the sum allotted for head-money upon the capture of this *Spanish* ship of war. The *El Rayo* being a ship of one hundred guns, and having eight hundred and twelve men on board, had been engaged on the 21st of *October* 1805, in the memorable action off *Trafalgar*, between the *British* and the combined *French* and *Spanish* fleets, but had returned into *Cadiz* on the evening of that day. On the 23d of *October* she again came out, for the purpose of assisting some of the ships of the combined fleet which were dismasted and otherwise in distress; in the execution of which duty she was captured, on the following day, by His Majesty's ship the *Donegal*. The *Donegal* had originally formed part of the fleet under the command of Lord *Nelson*, but had been detached upon other service before the engagement commenced; and on the evening of the 22d, being the day after the battle, she again joined the *British* fleet, then under the command of Admiral *Collingwood*. On the morning of the 24th she captured and took possession of the *El Rayo*, which made no resistance; and, consequently, no aid was required to effect the capture, nor was any given. Several ships belonging to the *British* fleet, particularly the *Leviathan*, were in sight at the time of the capture, but they were all employed in taking care of the disabled ships and prizes, and the attention of the *Leviathan* was principally directed to the *Spanish* ship the *Monarca*. The *Leviathan* fired a shot as a signal to the

the *Monarca*, which fell between that ſhip and the *El Rayo*; and from this circumſtance, and the proximity of her ſituation at the time, it was ſubmitted, that the *Leviathan* had actually contributed to the ſurrender of the prize, and was, therefore, entitled to ſhare in the head-money.

JUDGMENT.

Sir *W. Scott*.—A decree was originally made in this cauſe, entitling the fleet generally to ſhare in the head-money due on account of this capture. At the time when this decree was made, no circumſtances had tranſpired which gave reaſon to ſuppoſe that a peculiar claim would be ſet up for any individual ſhip. It is now, however, aſſerted on behalf of His Majeſty's ſhip the *Donegal*, that ſhe was the ſole captor; and a claim has alſo been made on the part of the *Leviathan* to ſhare as joint-captor with the *Donegal*, to the excluſion of the reſt of the fleet.

The firſt point to be decided is, whether, upon the ſtatement of facts now before the Court, the whole fleet is or is not entitled to ſhare in this bounty of the Crown. I accede to the principle laid down by the King's advocate, that if this capture could be conſidered as a continuation of the general action, then the whole fleet would be equally entitled to head money, notwithſtanding the formal ſurrender to one particular ſhip belonging to the fleet. If the prize now in queſtion before the Court had not gone into port, and come out again upon a new enterprize, the capture might, I think, very fairly have been conſidered as forming a continuation of the general engagement. But here are two circumſtances which take it out of this principle,—Firſt, the ſhip to which

the

The El Rayo.

May 14th, 1811.

the ſurrender was made had been detached on other ſervice, and did not compoſe a conſtituent part of the original fleet by which this memorable engagement had been ſuſtained.—Secondly, the captured veſſel was not left after the action upon the field of battle, but had eſcaped from her victorious enemies, and got into port, from whence ſhe was again ſent out for the ſpecial purpoſe of aſſiſting other veſſels in diſtreſs. Now, theſe two circumſtances do, I think, completely deſtroy all ſuppoſition as to the continuity of the engagement. Neither the capturing nor the captured veſſel can be identified with the reſpective fleets between which the conteſt had taken place; and, upon this broad and intelligible ground of diſtinction, I ſhall pronounce againſt the claim of the fleet to ſhare in the head-money.

The next queſtion is with reſpect to the claim of the *Leviathan*; and that certainly approaches much nearer to the principle on which the Court is in the habit of acting, and reſts upon much nicer diſtinctions of law. The *Donegal* had been diſpatched from the *Britiſh* fleet for the purpoſe of ſecuring prizes; and if it had appeared that her attention had been in any manner directed to the *El Rayo*, her claim would, I think, have been pretty nearly made out. There was no combat between the prize and the actual captor, and all that was done on the part of the *Donegal* was the mere form of taking poſſeſſion. The *Leviathan* was in ſight at the time of the ſurrender, but her whole and undivided attention was directed to one object, the aſſiſtance of the *Monarca*. The *Leviathan* did, indeed, fire a gun; but this was merely as an admonitory ſignal to the *Monarca*, without any intention of compelling the ſurrender of the *El Rayo*, or of producing

The
EL RAYO.

May 14th, 1811.

producing any effect upon that ſhip by intimidation or otherwiſe. The *Leviathan* was certainly within reach, and might have given aſſiſtance, if any had been required, but ſhe neither afforded any actual contribution of endeavour, nor had ſhe the moſt diſtant intention of ſo doing, being wholly employed on another and different ſervice. With reference, then, to the rule applied to head-money, I think her intereſt is not eſtabliſhed. It is a caſe very different from that put by Dr. *Luſhington*, of a purſuit by a frigate and a ſeventy-four gun ſhip, where a ſurrender was produced by the exertions of both veſſels. In ſuch a caſe, both would, undoubtedly, be entitled to the head money, although the actual ſurrender might be made to the frigate, and poſſeſſion taken by her only. But in this caſe there was no purſuit, and nothing was done by the *Leviathan* to produce the event which has occurred. I ſhall, therefore, pronounce for the excluſive right of the *Donegal*; but, as this caſe has been very properly brought to the notice of the Court, and has been conducted with the utmoſt fairneſs and propriety, I ſhall decree the expences on all ſides to be paid out of the ſum allotted for head money.

May 21st, 1811.

L'ESPERANCE, STEGMAN.

Derelict, case of—Moiety given to salvors.

THIS ship, laden with a cargo of staves and deals, and bound on a voyage from *Dantzic* to *London*, struck upon the *Lemon* and *Ower Bank*, on the 15th of *August* 1809, the wind at that time blowing hard from the S. S. W. and was, on the same day, deserted by the master and crew, who, by means of their boats, and the assistance of a hoy which was accidentally passing by, proceeded in safety to the port of *Yarmouth*. On the 17th of *August* she was discovered in latitude 53° 17′ North, and longitude 2° 24′ East, by His Majesty's sloop of war *L'Espiegle* and the *British Hero* transport vessel; when, upon examination, it appeared that she was completely water-logged, that all her sails, as well as her running rigging and part of her standing rigging, were cut away and gone, and her rudder knocked off, but her ground tackling was complete. A search was made for the ship's papers, but none could be found by which the name or destination of the vessel could be in any manner ascertained. The ship was then furnished, under the direction of Captain *Atchison*, the commander of the *L'Espiegle*, with the necessary sails and rigging; but being still in a very unmanageable state, he directed her to be taken in tow by the *British Hero*, and the wind being favourable, she was, by means of such assistance, navigated to *Heligoland*, where she arrived in safety on the 20th of *August*. At *Heligoland* every exertion was made to refit the ship, and on the 6th of *September*, Captain *Atchison*, having received orders to proceed

proceed to the *Downs* with the ſame tranſport under his convoy, ordered the *L'Eſperance* again to be taken in tow by the *Britiſh Hero*, having firſt ſent on board her a lieutenant, a midſhipman, and ten men, from the *L'Eſpiegle*, to manage and direct her ſteering and ſailing whilſt in tow of the Tranſport. In this manner the veſſels proceeded till the 11th of *September*, when the wind ſhifted to the weſtward, and the Tranſport being unable to weather the *Goodwin Sands*, was obliged to caſt off her tow-rope, and leave the *L'Eſperance* to her fate. In this perilous ſituation, the officers and men who had been ſent on board the *L'Eſperance*, by very great exertion and ſkilful management, ſucceeded in conducting her to the *Downs*; from whence ſhe was afterwards, on the 16th of the ſame month, removed by them to *Sheerneſs*, as a place of greater ſecurity. In the mean time, the owners of the cargo received a letter from the maſter, dated the 17th of *Auguſt*, adviſing them of his having left the ſhip on the *Lemon* and *Ower Sand*. Judging, from the buoyant nature of the cargo, that the ſhip would float, they immediately ſent down proper perſons to tow her and her cargo to *Yarmouth*; but, before the arrival of theſe men, the veſſel had been diſcovered and carried away by the ſalvors.

JUDGMENT.

Sir *W. Scott*.—This muſt be conſidered a caſe of clear derelict, upon the deſcription given by the owners themſelves, who admit, that the ſhip, in the proſecution of a voyage from *Dantzic* to *London*, with a cargo of ſtaves and deals, ſtruck upon the *Lemon* and *Ower Bank*, in which ſituation ſhe was deſerted by the maſter and crew. It is alleged, however, by the perſons on whoſe

L'Espérance. May 21st, 1811.

whose behalf the property has been claimed, that they received a letter from the master, advising them of his having left the ship; and that they immediately sent down proper persons to take charge of her and her cargo. Now the people who were thus employed by them must be understood to have been sent out upon a mere conjectural hope of saving the property, since, although from the nature of the cargo there was little danger that the ship would sink, yet it must undoubtedly have been the expectation and belief of persons so leaving their ship, that she would break to pieces. The probability of her being recovered was extremely slight: There was, in the first place, the chance of not finding her, and secondly, that if found, she would be a complete wreck. In this state of derelict she was discovered by His Majesty's sloop *L'Espiegle*, with the *British Hero* transport under convoy, bound on a voyage to *Heligoland*, to which place they conveyed her, having first supplied the necessary sails and rigging, to enable her to reach that place in safety. It has been said, that it was the duty of the salvors to have brought this ship to the nearest port in *England*, and not to have taken her out of her course to *Heligoland*. But the ship's papers having been taken away by the master and crew, it was utterly impossible for the salvors to discover to what country the ship was destined; and even if it had appeared that she was bound on a voyage to *Great Britain*, still, having been themselves dispatched upon His Majesty's service, they could not have returned for the mere purpose of towing this vessel to *England*. They were therefore under the necessity of taking her with them, and could not, consistently with their public duty, have saved her in any other way. The exertions which they

made for the ſafety of the property appear to me to conſtitute a caſe of great merit, and the Court is extremely willing, as upon all occaſions of a ſimilar kind, to grant a liberal remuneration. But in no inſtance (except where the crown alone has been concerned, and where no claim has been given for a private owner) has more than one-half been decreed by way of ſalvage. As this property is valuable, the nett proceeds of the ſhip, cargo, and freight, amounting to more than £12,000, there ſeems to be noreaſon for going beyond this rule upon the preſent occaſion. I have no doubt of allowing a moiety; and the only queſtion then is, reſpecting the apportionment between the ſalvors of the ſum ſo allotted. Now the king's ſhip is, I think, to be deemed the principal ſalvor, the commanding-officer of that ſhip having preſided on the occaſion, and given the neceſſary directions as to the beſt and moſt efficacious mode of ſaving this property; but it muſt at the ſame time be taken into conſideration, that the chief part of the labour lay upon the crew of the Tranſport. In order to make an equitable diviſion between the parties entitled, it appears to me, that ſome reference ſhould be had to the number of perſons on board each of the ſhips. The crew of the Tranſport, it ſhould ſeem, conſiſted of 36 men; and though it does not appear from any evidence in the cauſe what might be the exact number on board the king's ſhip, yet, judging from the ſize of the *L'Eſpiegle*, and from the number of hands uſually allotted to veſſels of the ſame rate and deſcription, the probability is, that there were from 90 to 120 men on board that ſhip. Without entering into any very minute diſtinctions upon this point, I ſhall direct three-fourths of the ſalvage money to be paid to the com-

L'ESPERANCE.

May 21ſt, 1811.

mander, officers, and crew of His Majeſty's ſloop *L'Eſpiegle ;* and the remaining one-fourth thereof to the maſter, officers, crew, and owner of the tranſport veſſel. The accounts of charges attending the execution of the commiſſion of unlivery and appraiſement appear to be enormous : thoſe I ſhall refer to the conſideration of the regiſtrar and merchants.

May 23d, 1811.

NIED ELWIN, NIESS.

Bail bonds are not mere perſonal ſecurities to individual captors, but are given to the Court to abide the adjudication of all events impending before it at the time—Sureties not reſponſible in caſe of a ſubſequent intervention of hoſtilities—Bail diſmiſſed.

THIS veſſel, ſailing under *Daniſh* colours, and laden with a cargo of ſugar, coffee, elephants' teeth, and other articles, was captured on the 16th *September* 1806, by the private ſhip of war *Happy Return.* On the 14th of *October*, in the ſame year, the ſhip was reſtored by conſent, with freight and expences. Claims were given for the cargo on behalf of Meſſrs. *Ryberg* and Company, of *Copenhagen*, and others ; and on the 6th of *May* 1807, the cauſe came on for hearing ; when the Judge reſtored four-ſevenths of the general cargo, and ordered further proof of the remaining three-ſevenths, and of the elephants' teeth. On the 13th of *Auguſt* 1807, bail was given to the captor, to anſwer adjudication in the ſum of £20,057. 9s. 4d., being double the appraiſed value of the ſaid three-ſevenths of the general cargo and the elephants' teeth. On the 12th of *February* 1808, the Judge pronounced the further proofs to be ſufficient, and the goods to be *Daniſh* property, and directed the captor's general expences to be paid. The King's advocate now moved for condemnation of the property to the Crown,

The NIED ELWIN.

May 23d, 1811.

Crown, in conſequence of the hoſtilities which had ſince been declared between this country and *Denmark*; and alſo for a monition againſt *Smith* and *Wolf*, the bail, to anſwer the adjudication.

On behalf of the Crown, the King's advocate and *Jenner* argued, that the bail bond muſt be conſidered in all reſpects as a ſubſtitute for the thing itſelf; that it was not confined to the individual captor to whom it was given, but was to anſwer all queſtions, relative to the property, which might ariſe before the ultimate adjudication of the cauſe: that bail bonds are never in poſſeſſion of the captors, but of the Court, and therefore it would be too much to maintain, that they can only be put in ſuit by the perſons to whom they are given by name; that the Crown muſt for ſuch purpoſes be conſidered in all reſpects as identified with the captor; that all right of capture proceeded from the Crown, and that all right of prize veſted originally in the crown: that in a caſe of joint capture it could never for a moment be contended that the bail would not be reſponſible to the joint captor, who had ſubſequently proved his intereſt, as well as to the actual captor, to whom alone the bond was given: that in the caſe of property condemned, under the proviſions of the prize act, to the Crown, inſtead of the captor, by whom the proceedings were originally inſtituted, the reſponſibility of the bail was indiſputable. It was further urged, that it is the policy of this country to conſider all property depending in judgment before the Court as liable to condemnation in caſe hoſtilities ſhould ſupervene; and that it was juſt and reaſonable that a bond taken for ſuch property ſhould be ſubject to

45 G. 3. c. 72. § 32.

The NIED ELWIN.

May 23d, 1811.

the ſame conſiderations, and that the poſſeſſion of it ſhould be conſidered as equivalent to the poſſeſſion of the property itſelf.

For the bail.—*Arnold* and *Adams* contended, that bail bonds were granted for a limited purpoſe only; that they were given to the captor, and not to the King: that if the Court ſhonld decide otherwiſe, no bail would ever be given in future: that the preſent ſecurity was given merely to anſwer the point then before the Court for its deciſion; namely, whether this was or was not *Daniſh* property: that the parties were induced to give ſuch bail by the eſtabliſhed credit of Meſſrs. *Ryberg* and Company, on whoſe behalf the goods were claimed, by the firm expectation that thoſe gentlemen would be able to eſtabliſh their property in the goods, and alſo, by the confidence they entertained, that, in the event of condemnation, the owners would furniſh them with the means of diſcharging the bond: that at the time when this ſecurity was given the parties had not the leaſt expectation of a war between this country and *Denmark*: that if the bond were to be enforced againſt them, they alone would be the ſufferers, having no means of calling upon the *Daniſh* merchants for payment in conſequence of the war with *Denmark*.

JUDGMENT.

Sir *W. Scott*.—The queſtion in this caſe is, whether the parties who have given bail to anſwer adjudication are ſubject to this demand of the Crown to bring in the amount of the value of the goods for which they have become ſecurities. At the time the property was delivered on bail, the queſtion depending before the Court was, whether that part of the cargo which was ordered for further proof was or was not *Daniſh* property: if it really

The NIED ELWIN. — *May* 23d, 1811.

really belonged to ſubjects of *Denmark*, the party making the claim would at the time have been entitled to reſtitution, and, upon due proof of the property being made, the bail would have been equally entitled to their diſmiſſal. Now, I cannot entirely accede to the poſition which has been laid down on behalf of the claimant, that theſe bonds are mere perſonal ſecurities given to the individual captors; becauſe I think, they are given to the Court as ſecurities to abide the adjudication of all events at the time impending before it. This Court is not in the habit of conſidering the effect of bonds preciſely in the ſame limited way as they are viewed by the courts of common law. In thoſe courts they are very properly conſidered as mere perſonal ſecurities for the benefit of thoſe parties to whom they are given. In this place they are ſubject to more enlarged conſiderations: they are here regarded as pledges or ſubſtitutes for the thing itſelf, in all points fairly in adjudication before the Court. The caſes put by the King's advocate fully eſtabliſh this point, and it would be eaſy to ſuggeſt others in ſupport of the ſame doctrine.—Suppoſe a bond given to the actual captor to anſwer the adjudication of property, which ſhould, from the locality of the capture, be ſubſequently condemned to the King in his office of Admiralty; I have no heſitation in ſaying, that the bail would in ſuch a caſe be anſwerable to the Admiralty.

But the queſtion ſtill recurs.—Has the Crown a right to enforce payment from theſe parties in the event, which has ſince occurred, of *Daniſh* hoſtilities? I am of opinion that it has no ſuch right: that is an event which, I am perſuaded, was not in the contemplation of the parties at the time they entered into this

The
NIED ELWIN.

May 23d,
1811.

ſecurity; it has no connexion with the queſtion which this bail was given to anſwer, namely, whether theſe goods were *Daniſh* property or not. The preſent is an adjudication upon an entirely new queſtion, ariſing out of an entirely new ſtate of things, and cannot be identified with the original proceedings in the cauſe. The Court does, indeed, upon the intervention of hoſtilities, accept the old proceedings, and upon them pronounce for the intereſt of the Crown; but it does ſo merely for the purpoſe of ſaving time and expence, and not with any view of fixing a reſponſibiliiy on thoſe who have given bail to anſwer a very different queſtion. If the Court were to accede to the prayer of the Crown upon this occaſion the effect would be monſtrous; it would extinguiſh altogether the practice of delivering property upon bail, a mode ſo much encouraged by the Court and by the legiſlature. No *Britiſh* merchant would become ſecurity for foreign claimants in any caſe, if he ſhould be conſidered reſponſible to the extent of ſuch a poſſible contingence as that of a ſubſequent intervention of hoſtilities. How could this Court expect it? How could the neutral world expect it? I am clear that I have no authority to compel theſe merchants to bring in the amount of the property, and I pronounce for the diſmiſſal of the bail.

EDEL CATHARINA, CLAUSEN.

June 5th, 1811.

THIS was the caſe of a ſhip under *Daniſh* colours, laden with a cargo of deals and other goods, on a voyage from *Oſter-Ruſoer* to *Heligoland*. At the time of capture there was a *Britiſh* licence on board, permitting the veſſel to come *to any port of the United Kingdom*; and the queſtion was, whether the terms of the licence would enure to the protection of the preſent voyage.

Licence to come *to any port of the United Kingdom* will not protect a ſhip deſtined to *Heligoland*.

JUDGMENT.

Sir *W. Scott*.—This ſhip and cargo are the property of His Majeſty's enemies, and muſt be liable to condemnation, unleſs it can be ſhewn that they are entitled to any ſpecial protection. It appears that the ſhip was deſtined on a voyage to *Heligoland*, and that ſhe had a licence on board, permitting her to come to any port of the United Kingdom. Now the iſland of *Heligoland* has been reduced by conqueſt into *Britiſh* poſſeſſion, but it forms no part of the United Kingdom, nor has it been in any manner incorporated with the King's dominions. Though under the control of His Majeſty, it is no more a part of the United Kingdom than any of the *Daniſh* colonies in the *Weſt Indies*, which have ſurrendered to His Majeſty's forces. The greater contiguity of *Heligoland* to this country does not, in the ſlighteſt degree, alter the nature of the caſe. The iſlands of *Guernſey* and *Jerſey*, though very ancient poſſeſſions of the crown, have never been conſidered, to all intents and purpoſes, parts of the United King-

The EDEL CATHARINA.

June 5th, 1811.

dom. The ports of thoſe iſlands have, indeed, for many purpoſes, been aſſimilated to thoſe of *Great Britain*; but, in other reſpects, they have always been held to differ, as in the caſe of duties. The trade of *Heligoland* is likewiſe under ſpecial prohibition, the Order in Council (31ſt *May* 1809) directing that the trade to and from that iſland ſhall be confined to *Britiſh* ſhips navigated according to law, except in caſes where His Majeſty may be pleaſed, by ſpecial licence, otherwiſe to permit. Such is the ſtate of the law as preſcribed by Government for regulating the commercial intercourſe with *Heligoland*, and this Court does not think itſelf intitled to make a diſtinction where none has been made by a ſpecial order. It has been ſaid, that the tranſgreſſion of the law, if any, has proceeded from an error in the party; but I think this can hardly be the caſe, conſidering the length of time which has elapſed ſince the regulation was eſtabliſhed. The order is of very long ſtanding, and it is hardly poſſible that the prohibition ſhould have been unknown in *Denmark* at the time when the preſent voyage commenced.—— Ship and cargo condemned.

Appendix, A.

ROSE IN BLOOM, OLCOTT.

June 21ſt, 1811.

THIS was the caſe of a ſhip under *American* colours, having a number of paſſengers and ſeveral puncheons of brandy on board, with which ſhe was proceeding from *Bayonne* to *New York*, when ſhe was captured on the 1ſt of *May* 1811, and brought into *Plymouth*.

Order in council prohibiting trade with the enemy applies to a part as well as the whole of a cargo —Conveyance of paſſengers for hire equivalent to conveyance of goods for freight.

JUDGMENT.

Sir *W. Scott*.—This ſhip was taken in the proſecution of a voyage from the blockaded port of *Bayonne* to *New York*, and is proceeded againſt for a breach of the Order in Council of the 26th of *April* 1809. Appendix, B.

It is the duty of this Court to enforce the obſervation of the Orders in Council againſt all breaches whatever, and to apply them to every caſe of a commercial nature, without regard to the extent of the particular tranſaction, whether it be great or ſmall, whether it compriſes the whole or the part of a cargo, unleſs the amount in value ſhall appear to be ſo very trifling as to bring it within the maxim, *de minimis non curat lex*. Carrying a part of a cargo only will afford no protection againſt the penalties impoſed by this order; ſince the miſchief would, in that caſe, be ſubſtantially or at leaſt eventually the ſame as if permiſſion were granted to take whole cargoes. The reſtrictions which it was the object of the Order to impoſe upon the trade of the enemy would, in fact, be no reſtrictions at all, if ſuch a laxity of interpretation were once admitted.

This

The ROSE IN BLOOM.

June 21ſt, 1811.

This Court has likewiſe been inclined to hold, that the conveyance of paſſengers for hire is equivalent to the conveyance of goods for freight, and conſequently has conſidered it to be that ſort of trading which comes within the prohibition preſcribed by the Order in Council. In this light the Court is bound to view the preſent tranſaction, unleſs it can be ſhewn that the paſſengers were put on board under ſuch circumſtances as would take the caſe out of the application of the general rule of law. What has been ſtated reſpecting the conveyance of diſtreſſed *American* ſeamen, is a matter to which the Court would, from motives of humanity, be willing to pay every attention. It is well known that many *American* ſeamen have been thrown out of employment, and detained in the ports of *France*, by the violence of the ruling power in that country; and, if this ſhip had been employed by the *American Chargé des Affaires* for the ſole purpoſe of taking home theſe poor men, it would, I think, have been entitled to a very favourable conſideration. Had the tranſaction confined itſelf within theſe limits, the preſent caſe might reaſonably have been conſidered to form an exception to the general rule. It is, however, highly requiſite, that the exiſtence and contents of any ſuch contract ſhould be fully eſtabliſhed in evidence. The Court muſt naturally expect that it ſhould appear, with certainty, what were the ſpecific purpoſes for which the ſhip was engaged, and how far any indulgence was required by the *American* miniſter. In the preſent caſe, no ſuch contract is produced, nor is any ſatisfactory excuſe offered for its non-production; the matter is left upon the ſole teſtimony of the maſter, who ſays, that the *American* miniſter allowed him the liberty of taking on board

The ROSE IN BLOOM.

June 21ſt, 1811.

board ſuch other paſſengers as he might think fit. I profeſs that I cannot bring my mind to give full credit to this repreſentation ſo made by the maſter, that every thing was left entirely to his diſcretion. It never could have been that Mr. *Ruſſel* granted to this man the unlimited permiſſion of carrying paſſengers of all deſcriptions, whether of a civil or military character, whether neutrals or belligerents. I conſider it to be a radical defect in the caſe, that the contract is not produced.

According to the hiſtory given by the maſter in his depoſitions, this veſſel had been "captured by a *French* "Government barge, and carried into *St. Sebaſtian's*, "where ſhe remained until the 18th day of *April* fol- "lowing, when ſhe was ordered by the *French* "Government to *Bayonne*, in *France*, at which place "ſhe arrived on the ſame day, ſhe being then in the "poſſeſſion of a *French* officer and crew: that the ſaid "ſhip and cargo were then ſold, and the proceeds "lodged with the *French* Government, and where the "ſame now remain: that he, this deponent, pur- "chaſed the ſaid ſhip at public ſale at *Bayonne* afore- "ſaid, on account of the former and preſent owners;" and I think it appears, from one of the letters found on board, that the purchaſe was made in conſequence of directions given by the owners themſelves. What is this but buying in a blockaded port, which act, regarded ſtrictly, is in itſelf a violation of the Order in Council prohibiting all trading whatever? At the ſame time, the Court would be very unwilling to preſs too hard upon the conduct of parties, where the property has been, under ſuch circumſtances, repurchaſed from the enemy for the benefit of the former owners: Conſidered in the favourable point of view which the Court is diſpoſed to take of ſuch a tranſaction, it amounts

The ROSE IN BLOOM.

June 21ſt, 1811.

amounts to little more than a ranſom or compromiſe. It would be a harſh meaſure to conſider That as a contravention of the *Britiſh* Order, which was done for the ſole purpoſe of extricating the property from the graſp of *French* violence.

The counſel for the claimants have, in the courſe of the argument, deſcribed this as a *Cartel ſhip*, but I think the term is not ſtrictly applicable to a neutral veſſel engaged in the ſpecies of ſervice for which this ſhip is ſaid to have been taken up by the *American* miniſter. The employment to which the privilege of a cartel is allowed, is of a very particular nature: It is a mode of intercourſe between hoſtile nations, invented for the purpoſe of alleviating, in ſome degree, the calamities of war, by reſtoring to their liberty thoſe individuals who may happen to have fallen into a ſtate of captivity. It is for the mutual exchange of priſoners of war; and, therefore, properly ſpeaking, it can have place between belligerents only. But the employment of this veſſel is in a ſervice of a different deſcription. It is the tranſaction of a neutral ſtate, acting for its own purpoſes without reference to the exiſtence of a war with any other country. It can never be treated as a general rule, that a veſſel ſo employed would be protected on a voyage otherwiſe illegal.

But this is by no means the whole of the preſent caſe. The letters, I think, ſhew that the veſſel was laden with two different quantities of brandy, conſiſting of twenty puncheons each; but, take it only as of ſmaller amount, (one ſuch quantity,) the difference is not material. Whatever might be the preciſe amount, it muſt, in either caſe, be conſidered as cargo.

It appears, likewiſe, that there were on board twenty-ſix packages, of very conſiderable value. The witneſſes

neſſes do not, indeed, any of them ſpeak directly to the contents of theſe packages, but the maſter ſtates, that "certain officers of the revenue, at *Plymouth*, "came on board the ſaid ſhip whilſt lying in *Catwater*, "in order to ſearch for contraband goods, having "aſſerted, that they had ſeized one hundred yards of "lace and upwards, taken aſhore from the ſaid ſhip." I cannot view theſe packages in any other light than cargo, and conſider the conveyance of them as a direct employment of the veſſel for the purpoſes of commerce. I ſhall therefore pronounce this ſhip to be liable to confiſcation, and ſhall condemn the cargo alſo, with the exception of the ſtores, which have been claimed for the *American* Government, and which were put on board this ſhip for a legitimate purpoſe, the uſe of the *American* ſeamen.

The Rose in bloom.

June 21ſt, 1811.

FINANCIER, CATHELL.

July 24th, 1811.

JUDGMENT.

SIR *W. Scott*.—This is a claim ſet up on behalf of the officers and crew of His Majeſty's ſhip *Britomart*, to ſhare in a prize taken by the *Deſiree*, in ſight of another king's ſhip, the *Quebec*. In the preparatory examinations, no mention whatever is made of the *Britomart*'s having joined in the chace, or having been preſent at the time of capture; on the contrary, the maſter and mate both ſay, that they were taken by His Majeſty's frigate *Deſiree*, and that the only other ſhip they obſerved in ſight at the time of the capture was an *Engliſh* frigate, called the *Quebec*, which had chaſed the

One of two joint chaſers being ordered to pick up the boats of the other, and in conſequence of the delay occaſioned by her obedience to thoſe orders loſing ſight of the prize, is not entitled to ſhare with a third ſhip coming up and making the actual capture.

The FINANCIER.

July 24th, 1811.

the prize the whole of the day previous to the capture. No perſon from on board the captured ſhip has been examined upon the preſent allegation. Whether the crew of the *Financier*, the prize in queſtion, had left this country before the allegation was admitted, or from what other cauſe this defect in the regular evidence has proceeded, does not appear. Thoſe who have been produced for examination are either releaſing witneſſes belonging to the *Britomart* herſelf, or perſons from the *Quebec*, which is admitted to have joined in the chace, and whoſe intereſt, as joint-captors, is not denied. Theſe laſt are entirely diſintereſted witneſſes, and upon their teſtimony the Court will, upon that account, be inclined to place the greateſt reliance. Captain *Hawtayne*, who commanded the *Quebec*, ſays, " that the ſaid ſhip being on a cruize off the *Texel*, in " the month of *May* laſt, a ſchooner was diſcovered " on the 23d day of the ſaid month of *May*, to which " His Majeſty's ſaid ſhip gave chace; that the ſaid " ſchooner was on the weather-beam of the *Quebec*, " ſteering to the ſouth-eaſt, carrying ſail, and appa- " rently endeavouring to effect her eſcape; that the " wind being tight, the deponent ordered four boats " from His Majeſty's ſaid ſhip *Quebec*, under the com- " mand of two lieutenants, properly manned, to go " in purſuit of the ſaid ſchooner, in order to come up " with and to board and detain her, if poſſible; and " they accordingly left the *Quebec* for that purpoſe, " about eight or half-paſt eight o'clock A. M. of the " ſaid 23d of *May*, and continued on that duty till " picked up by His Majeſty's ſhip *Britomart*, at the " time and in conſequence of the ſignal which will be " herein-after depoſed of. He ſaith, that about nine " o'clock A.M. of the ſaid day, a brig of war was

" ſeen in the N.W. quarter from the *Quebec*, but was " not in chaſe of the ſaid ſchooner, as ſhe, the ſaid " brig, kept a courſe widely different; that the *Quebec* " continued chaſing the ſaid ſchooner upon the courſes " gradually S.E. from South, and in the afternoon " gradually to the N.W., the wind changing alſo " gradually, during the day, from S.S.W. by the " Weſt to N.N.E.; that the ſaid brig of war, which " afterwards proved to be His Majeſty' ſhip *Britomart*, " *William Buckley Hunt* Eſquire, commander, con- " tinued under eaſy ſail (for ſuch weather if ſhe had " then been in chaſe) upon a courſe which, in the " deponent's opinion, was three points more to the " ſouthward and weſtward than the *Quebec* was ſteering, " and by that means increaſed her diſtance ſo con- " ſiderably from the *Quebec*, as to be hardly viſible " from on board that ſhip in the intermediate time, " between about nine o'clock A.M. and twelve and " one o'clock at noon of the ſaid day; and was alſo, " during that time, ſo very conſiderably diſtant from " the ſaid ſchooner, that, in the deponent's opinion " and belief, the perſons on board the ſaid brig could " hardly ſee the ſaid ſchooner, for it was neceſſary " even for the deponent, at that time, to ſweep the " horizon with a glaſs to catch the ſaid brig. And " the deponent further ſaith, that, about one o'clock " P.M. of the ſaid day, it was obſerved from the deck " of the *Quebec*, with a glaſs, that the ſaid brig, which " afterwards proved to be the *Britomart*, had ſails ſet, " as if in chaſe, and with a view to come up with and " aſcertain the circumſtances attending the *Quebec*'s " chaſe of the aforeſaid ſchooner; and, as the ſaid " brig brought up with her a freſh wind, ſhe then " gained faſt upon the *Quebec* and ſchooner upon a

" parallel

The FINANCIER.

July 24th, 1811.

" parallel line to windward; and, at about four or " half-paſt four o'clock P.M. of the ſame day, ſhe " was aſcertained to be His Majeſty's ſhip *Britomart*;" (it appears that he did not before know what ſhip it was, and conſequently that theſe veſſels were not aſſociated for the purpoſe of cruizing together, or indeed upon any conjoint ſervice;) " ſhe having at that time " cloſed with the *Quebec* upon a contrary tack, which " laſt-mentioned ſhip was occaſionally firing at the " ſaid ſchooner; and when the ſaid brig *Britomart* " had cloſed, as aforeſaid, with the *Quebec*, ſhe, the " ſaid brig, commenced firing at the Chace, and in " conjunction with the *Quebec*, the ſaid ſchooner, the " Chace, being at that time about long cannon-ſhot, " or perhaps rather more, diſtance to windward of " His Majeſty's ſaid two ſhips. That about half-paſt " three o'clock, and before the *Britomart* had, as " aforeſaid, cloſed with the *Quebec*, the deponent, " who at that time ſuppoſed the ſaid brig to be a *Bri-* " *tiſh* ſhip of war, obſerved her to pick up one of the " *Quebec*'s boats; and after the *Britomart* had fired " ſeveral ſhot at the ſaid Chace, the Deponent finding " it neceſſary to have the boats belonging to the " *Quebec* taken up, and conſidering that the *Quebec* " had the advantage as the purſuing ſhip, he there- " upon, to prevent the neceſſity of the *Quebec* giving " up the chace to pick up her own boats, made a " ſignal to the *Britomart* to ceaſe firing, and to pick " up the ſaid boats." This, I preſume, was a very proper exerciſe of diſcretion on the part of Captain *Hawtayne*. It is not ſuggeſted that it was done from any ſiniſter motive, or with a view of depriving the *Britomart* of her right to ſhare. Thinking the *Quebec* had the advantage with reſpect to the chace, he directed

as

as he had undoubtedly a right to direct, the other ſhip to pick up the boats. The probability of the capture would have been leſſened if he had acted in a different way, by detaining the *Quebec* to pick up her own boats, as he muſt naturally have deſired otherwiſe to have done: having a choice of difficulties to contend with, he purſued that courſe of conduct which appeared to be moſt advantageous to the public ſervice. He goes on to ſay, " that Captain *Hunt*, of H.M.S. *Britomart*, " in obedience to ſuch ſignal, immediately ceaſed " firing, ſhortened ſail, and ſecured and took up the " other three boats belonging to the *Quebec*; and, " after having ſo done, the *Britomart* was ſeen by the " deponent"—to do what?——not to follow the prize in queſtion, but—" to follow the *Quebec* in purſuit of " the ſaid ſchooner." Captain *Hawtayne* further ſays, " that the weather then coming on extremely thick, " with ſmall rain, the *Britomart* was loſt ſight of from " the *Quebec* between ſix and ſeven o'clock in the " evening." Now, if the *Britomart* at that time loſt ſight of the *Quebec*, ſhe muſt, long before, have loſt ſight of the prize, which was far a-head of the *Quebec*. It was as much as the *Quebec* herſelf could do to keep ſight of the prize, and it is abſolutely impoſſible that the *Britomart* ſhould have ſeen the prize; I think Captain *Hawtayne* expreſſes himſelf with very great accuracy when he ſays, *She followed not the ſchooner, but* THE QUEBEC *in purſuit of the ſchooner*. The chace continues till nine o'clock, and then, for the firſt time, the actual captor, the *Deſiree*, makes her appearance, having no previous connection either with the one ſhip or the other; but, coming entirely unknown to either of them, from a different quarter, ſhe intercepts the prize before it could get into the *Texel*. It is the

The FINANCIER.

July 24th, 1811.

opinion of one of the witneſſes, that the prize would have eſcaped altogether from the *Quebec* and *Britomart*; and Capt. *Hawtayne* himſelf is clearly of opinion, that the *Deſiree* muſt, at all events, have been the actual captor. Now, this opinion of Captain *Hawtayne* and the other witneſs is in direct oppoſition to the ſtatement contained in the allegation, that the *Britomart* would have been the actual captor, if ſhe had not been detained in the ſervice of picking up the boats of the *Quebec*. It appears, that the *Quebec* and the prize tacked about ſeven o'clock at night, in order to avoid the *Dutch* coaſt; and Captain *Hawtayne*, founding his conjecture on the fact of her being in ſight the next morning, preſumes that the *Britomart* muſt have done the ſame. But, taking the fact really to be what Captain *Hawtayne* ſuppoſes it to have been, ſtill the *Britomart* muſt have been at a very conſiderable diſtance from the place where the capture was made; for it is not denied that the *Quebec* came up with the *Deſiree* and the prize at twelve o'clock at night, and that the *Britomart* did not arrive till ſeveral hours afterwards, namely, at five o'clock on the following morning. If the *Britomart* continued the chace of any ſhip, it muſt have been of the *Quebec*, and of That ſhe had entirely loſt ſight; the purſuit even of that ſhip cannot properly be denominated a chace; it was a conjectural purſuit only; it was a feeling about in the dark, a ſearch and enquiry, but no chace. The chace of the prize by the *Britomart* muſt be held to have ceaſed at ſix or ſeven o'clock on the evening before the capture, when ſhe was employed in picking up the boats of the *Quebec*; after which time ſhe never again got ſight of the prize. Then, by what poſſibility can the *Britomart* be conſidered

ſidered a joint chacer? The actual chace, that is, the chace by the ſhip which actually effected the capture, did not commence till long after the *Britomart* had diſcontinued the purſuit. In this ſecond and effectual chace ſhe did not in any manner co-operate; ſhe neither ſaw the chacer nor the chaced, and had no participation whatever in the tranſaction. On what principle then can it be contended that ſhe is entitled to ſhare by virtue of the former chace with the *Quebec*? The *Quebec* is herſelf only a conſtructive captor; and to let in another ſhip, merely becauſe ſhe had joined in a previous chace with a conſtructive captor, would be carrying the principle of conſtructive joint capture farther than it has ever yet been carried. The admiſſion of a conſtructive captor to ſhare with an actual captor is, in itſelf, an indulgent conſtruction of the law, which muſt not be further extended. Upon conſideration of the facts ſpoken to by the witneſſes, I am of opinion, that the *Britomart* is not entitled to ſhare as an actual joint captor, and that the principle of conſtructive joint capture will not aſſiſt her claim. Here is no intimidation of the enemy proved, nor, indeed, is there any thing to ſhew that the prize at all noticed the firing of the *Britomart*, the witneſſes in preparatory being entirely ſilent on the ſubject. Neither can it be ſaid that there was any encouragement of the friend, ſince it was utterly unknown to the capturing ſhip that the *Britomart* was in that neighbourhood. It appears to me, that there was no contribution of aſſiſtance, either actual or virtual—In point of fact, not any actual chace; in point of principle, neither encouragement of the friend, nor intimidation of the enemy.

The FINANCIER.

July 24th, 1811.

It may, perhaps, be deemed a hardſhip that this veſſel ſhould loſe the benefit of ſharing in the prize, in conſequence of the orders ſhe received, to pick up the boats of another ſhip, by which ſervice ſhe was delayed. The anſwer which muſt be given to thoſe who entertain ſuch an opinion is, that it is the firſt duty of the king's officers to obey the lawful commands of their ſuperiors, and that views of mere private advantage are of ſecondary conſideration only, and muſt give way to the imperative requiſitions of the public ſervice. I am of opinion, that it would be going beyond what the Court has hitherto done, to admit this claim.

The Court rejected the claim of the *Britomart*, but directed the expences to be paid.

July 31ſt, 1811.

MARY, MILLER.

Navigation laws, breach of — *European* goods muſt be brought *direct* from the mother country to the colony into which they are intended to be imported, and cannot legally be ſent from one *Weſt India* iſland to another.

THIS was the caſe of a ſhip under *Britiſh* colours, which was laden at the iſland of *St. Croix* with ſix bales of woollens, fifty-three trunks containing calicoes and various other articles of *Britiſh* merchandize, five caſks of hardware, two tierces of tin ware, two caſes of hats, ten boxes of handkerchiefs, and forty-ſeven boxes of ſoap, which had previouſly been imported into that place from *Great Britain*, and ſailed from thence to *Port Royal* in *Jamaica*, at which place ſhe was ſeized in *March* 1810, by *Henry Boys* Eſquire, commander of His Majeſty's ſhip *Mozelle*, and proceeded againſt as a forfeiture, in the Vice Admiralty Court at *Jamaica*.

On

The MARY.

July 31st, 1811.

15 Car. 2. c. 7.

On the 2d of *April* 1810, a libel was filed on behalf of the ſeizor, which pleaded, amongſt other things, that after the paſſing of a certain act of parliament made and paſſed in the fifteenth year of the reign of his late Majeſty King *Charles* the Second, intitled, "An Act for the encouragement of trade," and before the day of exhibiting this libel, to wit, on the 27th day of *March*, in the year 1810, ſix bales of woollens, &c. were imported in the ſaid veſſel called the *Mary*, into the ſaid iſland of *Jamaica*, the ſaid ſix bales of woollens, &c. being commodities of the growth, produce, and manufacture of *Europe*, and not *bonâ fide* and without fraud laden and ſhipped in *England*, *Wales*, or the town of *Berwick-upon-Tweed*, and not carried directly thence to the ſaid Iſland of *Jamaica*, contrary to the form of the ſtatute in ſuch caſe made and provided; whereupon the ſaid *Henry Boys* prayed that the ſaid veſſel the *Mary*, together with the goods laden in and on board the ſame, might be confiſcated and adjudged forfeited; one moiety thereof to the uſe of our Sovereign Lord the King, and the other moiety thereof to the uſe of the ſaid *Henry Boys*, commander of H. M. S. *Mozelle*, his officers, ſeamen, and marines.

A claim was given by *Wellwood Hyſlop*, merchant of *Kingston*, for the ſhip, on behalf of *Bibby* and Company, of *Liverpool*; and for the goods, on behalf of *William Taylor*, of the ſame place. *Hyſlop* ſtated, in his claim, that he had lately received a letter from *William Taylor*, of *Saint Croix*, dated 18th *March* 1810, incloſing a bill of lading and invoices for ſundry merchandize ſhipped by him to the claimant's addreſs in the *Mary*, by order of *William Taylor*, of *Liverpool*; and that in the letter were incloſed a bill of lading for all the *Mary*'s cargo, from *Saint Croix* to

The MARY.

July 31st, 1811.

Kingston, and four invoices, of which the three firſt were for ſeveral parts of the *Mary*'s cargo, ſtated reſpectively to have been parts of the cargoes of the *Sally*, the *William*, and the *Reſolution*, and to be ſhipped on board the *Mary*, conſigned to *Hyſlop* and Co., by order and on account of *Taylor*, of *Liverpool*; and the fourth invoice was for the reſidue of the *Mary*'s cargo, and purported to be for goods purchaſed by *Taylor*, of *Liverpool*, at *Mancheſter*. The claimant then further ſtated, that the whole of the *Mary*'s cargo was the property of *Taylor*, of *Liverpool*, and the claimant believed it to be of *Britiſh* manufacture, and to have been *bona fide* ſhipped at *Liverpool*, and from thence carried to *Saint Croix*, where the ſame was regularly laden in the *Mary*, for *Kingſton*, ſecurity being firſt given as required by law. In proof of which he referred to the documents annexed to his claim. He further ſtated his belief that *Bibby* and Co. were owners of the *Mary*, and in proof thereof referred to the certificate of regiſtry annexed to his claim. He ſtated, likewiſe, that, by an Order in Council of 11th *May* 1808, it was declared, that the King's ſubjects might lawfully trade to and from the iſland of *Saint Croix*, (*inter alia*,) ſubject to the ſame rules, &c. as the other *Weſt India* iſlands. And further, that the *Mary* was ſeized in the harbour of *Port Royal*, before her arrival at *Kingſton*, before ſhe had come to an anchor, and before ſhe had broken bulk; and that neither the owner of the ſhip or goods intended any fraud, the goods having been permitted by the cuſtom houſe at *Saint Croix* to be cleared for *Jamaica*, with a let-paſs from the governor of the iſland.

The documents annexed to the claim, beſides the bill of lading and invoices, the ſubſtance of which is

before

The MARY.

July 31st, 1811.

before ſtated, conſiſted of a clearance from the cuſtom houſe at *Saint Croix* for the *Mary* and her cargo, which cargo is ſtated to have been imported from *Liverpool*, in the *Reſolution*, the *William*, and the *Sally*, and to be all of *Britiſh* manufacture; of certificates of the proper bonds having been given; of a let-paſs from the governor of *Saint Croix*, and of the certificate of regiſtry for the *Mary* from the port of *Liverpool*, by which *Bibby* and Co. appeared to be the owners.

No witneſſes were examined on either ſide.

The cauſe came on for hearing in the Vice Admiralty Court at *Jamaica*, on the 23d of *April* 1810, when the Judge condemned the veſſel and goods according to the prayer of the libel. From this ſentence of condemnation the preſent appeal was proſecuted.

JUDGMENT.

Sir *W. Scott*.—This ſhip and cargo were proceeded againſt and condemned in the Vice Admiralty Court at *Jamaica*, for having imported into that iſland the ſeveral commodities encumerated in the libel, in violation of the ſtatute 15 *Car.* 2. *c.* 7. intitled, "An Act "for the encouraging of trade;" by the 6th ſection of which ſtatute it is enacted, "that no commodity of "the growth, production, or manufacture of *Europe*, "ſhall be imported into any land, iſland, plantation, "colony, territory, or place, to His Majeſty belong-"ing, or which ſhall hereafter belong unto or be in "the poſſeſſion of His Majeſty, his heirs and ſucceſ-"ſors, in *Aſia*, *Africa*, or *America*, but what ſhall "be *bonâ fide* and without fraud laden and ſhipped in "*England*, *Wales*, or the town of *Berwick-upon-Tweed*, "and in *Engliſh* built ſhipping, and whereof the maſ-

15 Car. 2. c. 7. § 6.

The MARY.

July 31st, 1811.

" ters and three fourths of the mariners at leaſt are " *Engliſh*, and which ſhall be carried *directly* thence " to the ſaid lands, iſlands, plantations, colonies, ter- " ritories, and places, and from no other place or " places whatſoever, any law, ſtatute, or uſage, to " the contrary notwithſtanding, under the penalty of " the loſs of all ſuch commodities, of the growth, " production, or manufacture of *Europe*, as ſhall be " imported into *any of them* from any other place " whatſoever, by land or water, of the ſhip or veſſel " alſo in which they were imported, with all her guns, " tackle, furniture, ammunition, and apparel."

It is admitted, on the part of the claimants, that theſe are *European* goods, and that they were imported, in the firſt place, into *Saint Croix*, and were afterwards carried on to *Jamaica*; but it is ſaid that they were not landed in *Jamaica*, and conſequently that the offence of importing them into that iſland was not conſummated. Now, in order to conſtitute an importation, within the meaning of the ſtatute, it is not neceſſary that the goods ſhould have been actually landed. It is ſufficient if they were brought into the harbour with an intention of importing them; and the exiſtence of ſuch an intention is not in the preſent caſe denied. It has likewiſe been urged, as a circumſtance favourable to the intereſts of the claimants, that they have conducted themſelves throughout the tranſaction with perfect good faith, that they have been guilty of no fraud or concealment, and that if they have engaged in a commerce which turns out to be not ſtrictly legal, it has ariſen from miſapprehenſion only, and not from any intention of violating the laws of the country. The conduct of the parties certainly does not appear to be tainted with ill faith; but that is a circumſtance which

can

can make no difference in the ſentence which it will be the duty of the Court, however repugnant to its feelings, to pronounce, provided the tranſgreſſion of the law is clearly eſtabliſhed.

The facts being admitted, I have only to inquire whether they do or do not fall within the range of the penalties impoſed by the act of parliament. In the preſent diſcharge of its functions, the Court has a very limited duty to perform: It is merely miniſterial in its application of the law to the caſe which now ſtands for deciſion, and muſt not ſuffer itſelf to enter into any ſpeculations on the policy of a meaſure which the wiſdom of the Legiſlature has thought proper to enact. Where the words of the ſtatute are clear and unequivocal, the Court is bound to interpret and to apply them according to their obvious meaning.

By the 6th ſection of the act, as above recited, the goods are to be ſhipped in *England*, *Wales*, or the town of *Berwick-upon-Tweed*, and to be "carried "*directly* thence to the ſaid lands, iſlands, plantations, "colonies, territories, and places, and from no other "place or places whatſoever." A *direct* importation, therefore, is neceſſary under this ſection of the ſtatute. Now the meaning of a *direct* importation, obvious enough in itſelf, has been further fixed by long uſage; and the only interpretation which has been, or can with any propriety be put upon the words, is, that the goods muſt be brought immediately from the place of ſhipment to the port of deſtination by a continued conveyance in the ſame veſſel. There muſt be no entrance of any intermediate port, nor any tranſhipment of the goods, unleſs ſuch meaſures are reſorted to under the preſſure of unavoidable neceſſity. It was, indeed, admitted, in the courſe of the diſcuſſion, that this is the true

15 Car. 2. c. 7. § 6.

The MARY.

July 31ſt, 1811.

true interpretation of the terms ; but it has been contended, that the ſpirit of the act would be ſufficiently complied with if the importation were direct into any one of the places ſpecified, though the goods ſhould be afterwards ſent on to another of ſuch places. The counſel for the appellants have endeavoured to ſuſtain this interpretation by obſerving that the words in the latter part of the ſection are in the plural number, and have inferred from thence the legality of tranſhipping and ſending on *European* goods from one colony in the *Weſt Indies* to another, provided the importation were directly and regularly made, in the firſt inſtance, into any one of the colonies. But I am of opinion, that this conſtruction is not ſuſtainable on the words themſelves, which muſt be taken in conjunction with the former part of the ſentence, which is in the ſingular number, and provides that the goods ſhall not be otherwiſe imported into any land, iſland, or colony, &c. The words which are plural muſt be taken diſtributively, and be conſtrued to mean *any* of the ſaid lands or iſlands. The mode of expreſſion here uſed is a ſort of ellipſis adopted for the ſake of brevity only, and muſt be underſtood to have the ſame meaning as the antecedent part of the ſentence. But the matter is put out of all doubt by the words which immediately follow, and which contain the penalty. The goods are to be forfeited if imported into *any of them* from any other place whatſoever. It is neceſſary, therefore, that the goods ſhould be brought *direct* from the mother country to the colony into which they are intended to be imported ; they cannot legally be ſent from one iſland to another. If a contrary uſage has erroneouſly obtained, which, judging from the publicity with which the preſent tranſaction has been conducted,

The MARY. July 31st, 1811.

ducted, I ſhould conceive may have been the caſe, ſtill the prevalence of ſuch a practice cannot be permitted to weigh againſt the poſitive injunction of the ſtatute. If a conſtruction different from that which I have aſſumed to be the true one could be upheld, then, as it has been pointed out by Dr. *Arnold*, it might, upon the ſame ground, be contended, that it is lawful to import goods directly to the *Britiſh* ſettlements in *Aſia* or *Africa*, and from thence to the *Weſt India* iſlands. The conſtruction in one caſe would be neceſſarily co-extenſive with the conſtruction in the other. But this circuitous mode of importing *European* commodities into the colonies could never be permitted, ſince it would open a wide door to fraud and inconvenience of every kind. I am clearly of opinion, that the rule requiring a direct importation from the mother country into each of the colonies, muſt be held imperative, unleſs it has been modified by ſubſequent acts of parliament.

Now ſeveral ſtatutes of a later date, particularly that of 7 & 8 *W.* 3. *c.* 22. paſſed for the purpoſe of regulating the plantation-trade, have been called in aid of the caſe of the appellants, and if it were clear that there could be no other trade between the colonial ports except in the tranſportation of *European* commodities, an inference might fairly be raiſed, that it was the intention of the Legiſlature, in paſſing this act, to authorize a trade in ſuch commodities. But there being a trade of another kind, namely, in articles the produce of the colonies themſelves, this ſtatute muſt be underſtood as compoſing a law for the regulation of that trade, and ſhall not be conſtrued to repeal a former ſtatute by mere inference, when there is another ſubject to which it will apply. The ſame obſervation will be ſufficient to do away any effect which might

7 & 8 W. 3. c. 22.

The MARY.

July 31st, 1811.

4 G. 3. c. 15. § 29.

45 G. 3. c. 57. § 9.

might otherwiſe be ſuppoſed to belong to another ſtatute which has been referred to, 4 *G.* 3. *c.* 15. *ſ.* 29. The act 45 *G.* 3. *c.* 57. by which free ports are eſtabliſhed in certain iſlands in the *Weſt Indies*, has likewiſe been reſorted to, and the clauſe in that act, has been pointed out, by which it is enacted, "that "it ſhall be lawful to export in any *Britiſh* ſhip or "veſſel, owned and navigated according to law, from "any of the ſaid iſlands in this act enumerated to any "*Britiſh* colony or plantation in *America* or the *Weſt* "*Indies*, any goods or commodities whatever of the "manufacture of *Europe*;" but the iſland of *Saint Croix* is not included in this number, and the enumeration of ſome ports muſt neceſſarily be held to operate to the excluſion of the others, and of *Saint Croix* among the reſt. If this, indeed, had been an exportation from *Kingston* in *Jamaica* to *Saint Croix*, the tranſaction would have been legal, *Kingston* being one of the enumerated ports, but the voyage from *Saint Croix* to *Kingston* is as clearly illegal.

It has been made matter of obſervation by the counſel for the claimants, that the Court below has not directed the diſtribution of the penalty in conformity to the proviſions of the law: The ſentence of the Vice Admiralty Court having ordered diſtribution to be made in moieties to the ſeizor and the crown, whereas by the ſtatute under which theſe proceedings have been inſtituted and carried on, it ſhould have been diſtributed in three parts, one-third to the king, another to the governor of the iſland, and another to the informer. In the mode of diſtribution, however, the claimant can be in no manner intereſted. I ſhall not diſturb the ſentence of the Court below, but ſhall affirm the condemnation of the ſhip itſelf, and of the goods enumerated in the libel.

15 Car. 2. c. 7.

SARAH, GILL.

July 31ſt, 1811.

Navigation laws —breach of. Importation of European goods into St. Croix from Heligoland illegal, that place not being conſidered a port of Great Britain. Want of cocket —condemnation.

THIS was the caſe of a ſhip under *Engliſh* colours, which ſailed from *Liverpool* on the 17th of *December* 1809, at which port ſhe was chartered for a voyage to *Heligoland*, and thence to *St. Croix*, in the *Weſt Indies*. The veſſel arrived at *Heligoland* on the 25th of the ſame month, and there took on board a cargo, conſiſting of 87 firkins of butter and 112 bags of beans, with which ſhe ſailed to *St. Croix*, without any clearance on board; and, upon her arrival at that iſland, was ſeized on the 30th of *March* 1810, by the ſearcher of the cuſtoms, who inſtituted proceedings againſt the ſhip and cargo, under the ſtatutes 15 *Car.* 2. *c.* 7. and 4 *Geo.* 3. *c.* 15.

15 Car. 2. c. 7. 4 Geo. 3. c. 15.

On the 19th of *April* the cauſe came on for hearing, when the Judge of the Vice Admiralty Court pronounced for the condemnation of the ſhip and cargo.

From this ſentence the preſent appeal was proſecuted.

JUDGMENT.

Sir *W. Scott.*—This ſhip and cargo are proceeded againſt on two grounds: firſt, for an importation into *St. Croix*, contrary to the ſtatute 15 *Car.* 2.; and ſecondly, for not being provided with the proper cocket or clearance from an officer of His Majeſty's Cuſtoms, as required by ſtatute 4 *Geo.* 3. *c.* 15. The proceedings in the Court below were conducted in a manner not the moſt regular, and the caſe was very

The SARAH.

July 31st, 1811.

ſlenderly furniſhed with evidence; but the Iſland of *St. Croix* having been but lately reduced into *Britiſh* poſſeſſion, the Vice-Admiralty Court there eſtabliſhed is, of courſe, not very well verſed in the accuracy of legal proceedings, as obſerved in the courts of this country, and, perhaps, is not in the habit of requiring proofs with reſpect to facts which are otherwiſe ſo well known, as the arrival of this ſhip and the exact place of ſeizure muſt neceſſarily have been in that colony.

It is ſaid that the fact of importation is not ſufficiently proved; that the maſter might have approached the iſland for the purpoſe of enquiry only, and with a view of going elſewhere, in caſe the importation could not be legally effected. But I think there is ſufficient proof of a fixed intention to import theſe goods. The ſhip is chartered to go from *England* to *Heligoland*, and thence to *St. Croix*, with articles which, in all probability, are the produce of the continent in the neighbourhood of *Heligoland*; and, if ſo, there is a direct violation of the whole principle of the colonial laws. The caſe ſets out with a breach of the cardinal point of policy in our colonial ſyſtem, which is to give, as far as poſſible, a monopoly of the trade to the mother-country. The ſhip was brought to *St. Croix*, clearly with an intention of landing the goods, if it could be in any manner effected. The maſter goes to the Cuſtom-Houſe, and reports his veſſel, but is not permitted to make his entry. His own conſent to the meaſure was full, *Quantum in ſe fuit* he had done to complete the importation, and was only ſtopped by the refuſal of the Cuſtom-Houſe to ſanction the proceeding.

It has been ſaid there is no evidence to ſhew that the veſſel was within the Harbour of *St. Croix* at the time of

The SARAH. July 31st, 1811.

of ſeizure, and certainly the witneſſes do not in expreſs words ſpeak to that fact. But they make uſe of terms of art which, in my opinion, amount to the ſame thing. They deſcribe the ſeizure to have been *within two leagues of the ſhore*, and the probability is, that it was within the harbour. The maſter had gone to the Cuſtom-houſe for the purpoſe of making an entry before the ſeizure took place, and the preſumption is, that the veſſel arrived with the maſter, unleſs the contrary be ſhewn. This preſumption is not rebutted by any thing offered in the way of defence or explanation, and therefore I ſhall hold that there is ſufficient proof of the ſhip's arrival within the harbour. I cannot attend to the ſuggeſtion which has been made, that the maſter *might* have come into the harbour in a boat, for the purpoſe of making enquiry at the Cuſtom-houſe. It is a ſuggeſtion proceeding from the counſel in the cauſe, not ſuſtained by any proof whatever to be found in the cauſe, where it would have been found if the fact had exiſted.

It has been contended, that the maſter had a perfect right to bring in his ſhip, and to enquire whether any part of his cargo might be admitted for importation, ſince the very ſame practice is allowed in the ports of this kingdom. I conceive the caſe to be very different in the colonies, where the trade is conducted upon a cloſe and reſtricted ſyſtem. The ſame liberty of coming in for the purpoſe of making enquiries cannot be there permitted.

Unleſs, therefore, it can be ſhewn that *Heligoland* is to be conſidered a port of *Great Britain*, the ſhip and goods are ſubject to condemnation under the ſtatute 15 *Car.* 2. Is it ſo for foreign commodities? I apprehend certainly not. It is indeed a Depôt for goods

The SARAH.

July 31st, 1811.

ſent from this country, but for what purpoſe? For introduction into the neighbouring continent; not for importation into the *Weſt India* Iſlands. If the point could be ſtrained ſo far as to have it conſidered a port of *Great Britain* for ſome purpoſes, ſtill it could never be ſo held for the purpoſe of introducing into the colonies articles the produce not of *Great Britain* but of the Continent. The Iſland of *Heligoland* is only under temporary ſubjection to the government of this country, and forms no part of the United Kingdom.

The reaſon aſſigned for the want of a cocket cannot be the true one. The maſter ſtates that it was refuſed by the cuſtom-houſe officer at *Heligoland*, notwithſtanding his repeated applications to obtain it. But this refuſal muſt have been occaſioned by the nature of the tranſaction, and by the conduct of the party himſelf.

I am of opinion that the ſhip and cargo are liable to condemnation on both grounds, and therefore I have no heſitation in affirming the ſentence of the court below.

FORTUNA*, VERISSIMO.

March 12th, 1811.

THIS veſſel ſailed from *New York*, under *American* colours, in the month of *July* 1810, being then named the *William and Mary*, and arrived at *Madeira* in *September*. The oſtenſible owner at this time was an *American* citizen of the name of *George Fowler Trenholm*, who alſo acted as maſter. On arriving at *Madeira*, he landed a part of his cargo; and about a week before his departure from it, he executed a bill of ſale for the ſhip to a native of *Madeira*, a *Portugueſe* ſubject, named *Joao de Souza*; and in conſequence of this ſale obtained *Portugueſe* papers and aſſumed a *Portugueſe* flag. This *Joao de Souza* is ſtated to be a man notoriouſly of no property, who is employed as a clerk in the ſtore of an *Engliſh* mercantile houſe in that iſland; and in point of fact, no conſideration was given for the veſſel. In thus lending his name to this tranſaction, *Joao de Souza* appears to have merely complied with the wiſhes of his employers, who were the conſignees of the *William and Mary*. The *William and Mary*, having thus become colourably the property of a *Portugueſe*, was re-named the *Fortuna*, and another *Portugueſe*, of the name of *Veriſſimo*, was appointed maſter. *George Fowler Trenholm*, the former

Any trade contrary to the general law of nations, although not tending to or accompanied with any infraction of the belligerent rights of that country whoſe tribunals are called upon to conſider it, may ſubject the veſſel employed in that trade to confiſcation.—The ſlave trade is now deemed by this country contrary to the law of nations, unleſs tolerated by the municipal regulations of the ſtate to which the owners of the veſſel engaged in the trade may belong.

---

* The caſe here inſerted is copied *verbatim* from the very accurate report of it publiſhed by the Directors of the *African* Inſtitution in their Fifth Number. The next caſe (the *Donna Marianna*) is taken from the Sixth Number of the ſame work.

The FORTUNA.

March 12th, 1811.

maſter, was now converted into a ſupercargo; and the whole conduct and entire controul of the ſhip and adventure were committed to him, without his even receiving any inſtructions whatever from the alleged owner, *Joao de Souza*. The only part of the cargo taken on board at *Madeira* conſiſted of ſome articles of proviſions for the voyage.

On the 6th of *October* this veſſel ſailed from *Madeira*, and, when about ſeven or eight miles diſtant from the harbour of *Funchall*, was captured by His Majeſty's ſhip *Melampus*, Captain *Hawker*, and ſent to *Plymouth*.

The evidence obtained by means of the ſtanding interrogatories afforded ſtrong ſuſpicion that the ſale at *Madeira* was a fraudulent and colluſive tranſaction. This ſuſpicion was afterwards fully confirmed, and it clearly appeared, from the mere inſpection of the veſſel, independently of other corroborating circumſtances, that the object of the voyage was to procure a cargo of ſlaves on the coaſt of *Africa*.

JUDGMENT.

Sir *William Scott*.—This ſhip, bearing the *Portugueſe* flag, was taken and brought in as prize, and proceeded againſt as ſuch by the captor. Depoſitions were taken; and it was not until a conſiderable time afterwards, that a claim was given by the maſter for this ſhip as the property of a *Portugueſe* owner. The captor in this caſe, as in other caſes of prize proceedings, gave no ſpecial allegation. The act of bringing her in, and proceeding againſt her, alleges her generally to be a ſubject of prize rights; but the captor

The FORTUNA.

March 12th, 1811.

captor is not called upon to ſtate, at the commencement of the ſuit, the particular grounds on which he contends that ſhe is ſo. He has a right to inſtitute the inquiry, and he takes the chance of the benefit of any fact that may be produced in the reſult of that inquiry. This is a great advantage on the ſide of the captor, but it is controuled by his liability to coſts and damages if the inquiry produces nothing; and it is fully balanced by the advantage given to the claimant in this ſpecies of proceeding, that no evidence ſhall be admitted againſt him but ſuch as proceeds from himſelf, from his own documents, and from his own witneſſes; the captor not being permitted, except in caſes marked by peculiar circumſtances, to furniſh any evidence whatever. In the preſent caſe it is not, I think, competent for the claimant to object that the captor had no right to inſtitute an inquiry whether the ſhip was *Portugueſe* or *American*. The captor inſtituted no ſuch inquiry: he alleged her ſimply to be prize, and proceeded againſt her generally as ſuch. If in the courſe of that general inquiry it turns out that ſhe is ſhewn to be clearly *American*, he has a complete right to avail himſelf of any benefit that may legally reſult from the capture of an *American* ſhip found in the circumſtances that are attributed to this ſhip at the time of her capture. If ſhe is liable to confiſcation on any ground ariſing from thoſe circumſtances ſo diſcovered, he is not to be told that the diſcovery has been produced in a way of which he has no right to take the advantage.

An *American* ſhip, *quaſi American*, is entitled upon proof to immediate reſtitution; but ſhe may forfeit, as other neutral ſhips may, that title, by various acts of miſconduct—by violations of belligerent rights moſt clearly and univerſally. But though the prize law

The FORTUNA.

March 12th, 1811.

looks primarily to violations of belligerent rights as grounds of confiſcation in veſſels not actually belonging to the enemy, it has extended itſelf a good deal beyond conſiderations of that deſcription only. It has been eſtabliſhed by recent deciſions of the ſupreme court, that the Court of Prize, though properly a court purely of the law of nations, has a right to notice the municipal law of this country in the caſe of a *Britiſh* veſſel which, in the courſe of a prize proceeding, appears to have been trading in violation of that law, and to reject a claim for her on that account. That principle has been incorporated into the prize law of this country within the laſt twenty years, and ſeems now fully incorporated. A late deciſion, in the caſe of the *Amedie* *, ſeems to have gone the length of eſtabliſhing

* This was an appeal from the Vice-Admiralty Court of *Tortola*, in which the veſſel and cargo had been condemned to the captors. The judgment of the ſuperior Court was pronounced by Sir *W. Grant*, Maſter of the Rolls, in the following terms, viz.

" This ſhip muſt be conſidered as being employed at the time of capture in carrying ſlaves from the coaſt of *Africa* to a *Spaniſh* colony. We think that this was evidently the original plan and purpoſe of the voyage, notwithſtanding the pretence ſet up to veil the true intention. The claimant, however, who is an *American*, complains of the capture, and demands from us the reſtitution of property of which he alleges that he has been unjuſtly diſpoſſeſſed. In all the former caſes of this kind, which have come before this Court, the Slave Trade was liable to conſiderations very different from thoſe which belong to it now. It had at that time been prohibited (as far as reſpected carrying ſlaves to the colonies of foreign nations) by *America*, but by our own laws it was ſtill allowed. It appeared to us, therefore, difficult to conſider the prohibitory law of *America* in any other light than as one of thoſe municipal regulations of a foreign ſtate of which this Court could not take any cognizance. But by the alteration which has ſince taken place, the queſtion

The FORTUNA.

March 12th, 1811.

eſtabliſhing a principle, that any trade contrary to the general law of nations, although not tending to or accompanied with any infraction of the belligerent rights of that country, whoſe tribunals are called upon to conſider it, may ſubject the veſſel employed in that trade to confiſcation. The *Amedie* was an *American* ſhip employed in carrying on the ſlave trade; a trade which this country, ſince its own abandonment of it, has deemed repugnant to the law of nations, to juſtice and humanity, though without preſuming ſo to conſider and treat it, where it occurs in the practice of the ſubjects of a ſtate which continues to tolerate and

---

tion ſtands on different grounds, and is open to the application of very different principles. The Slave Trade has ſince been totally aboliſhed by this country, and our legiſlature has pronounced it to be contrary to the principles of juſtice and humanity. Whatever we might think as individuals before, we could not, ſitting as Judges in a *Britiſh* Court of Juſtice, regard the trade in that light while our own laws permitted it. But we can now aſſert that this trade cannot, abſtractedly ſpeaking, have a legitimate exiſtence.

"When I ſay abſtractedly ſpeaking, I mean that this country has no right to controul any foreign legiſlature that may think fit to diſſent from this doctrine, and to permit to its own ſubjects the proſecution of this trade; but we have now a right to affirm that *primâ facie* the trade is illegal, and thus to throw on claimants the the burthen of proof that, in reſpect of them, by the authority of their own laws, it is otherwiſe. As the caſe now ſtands, we think we are entitled to ſay, that a claimant can have no right, upon principles of univerſal law, to claim the reſtitution, in a Prize Court, of human beings carried as his ſlaves. He muſt ſhew ſome right that has been violated by the capture, ſome property of which he has been diſpoſſeſſed, and to which he ought to be reſtored. In this caſe the laws of the claimant's country allow of no right of property ſuch as he claims. There can, therefore, be no right to reſtitution. The conſequence is, that the judgment muſt be affirmed."

The FORTUNA.

March 12th, 1811.

protect it by its own municipal regulations: but it puts upon the parties who are found in the occupations of that trade the burthen of ſhewing that it was ſo tolerated and protected; and on failure of producing ſuch proof, proceeds to condemnation, as it did in the caſe of that veſſel. How far that judgment has been univerſally concurred in and approved, is not for me to inquire. If there be thoſe who diſapprove it, I am certainly not at liberty to include myſelf in that number, becauſe the deciſions of that Court bind authoritatively the judicial conſcience of this; its deciſions muſt be conformed to, and its principles practically adopted. The principle laid down in that caſe appears to be, that the ſlave trade carried on by a veſſel belonging to a ſubject of the United States is a trade which, being unprotected by the domeſtic regulations of their legiſlature and government, ſubjects the veſſel engaged in it to a ſentence of condemnation. If the ſhip ſhould therefore turn out to be an *American* actually ſo employed; and it matters not, in my opinion, in what ſtage of the employment, whether in the inception, or the proſecution, or the conſummation of it; the caſe of the *Amedie* will bind the conſcience of this Court to the effect of compelling it to pronounce a ſentence of confiſcation.

The firſt and great queſtion of fact is, whether this ſhip is *American* or not; and it is objected, as exclusive of any poſſible imputation of that character, that ſhe is ſailing with a *Portugueſe* flag and paſs, which impreſs upon her a *Portugueſe* character concluſively; and many paſſages have been cited out of the reports of the caſes adjudged in this Court, in which ſuch a doctrine ſeems to be held out in terms. But the meaning of thoſe poſitions, which appear to contain it, is extremely

The FORTUNA.

March 12th, 1811.

extremely misunderstood in this application of them: all that the Court has thrown out respecting the effect of the flag and pass is this, that the party who takes the benefit of them is himself bound by them: he is not at liberty, when they happen to turn to his disadvantage, to turn round and deny the character which he has worn for his own benefit, and upon the credit of his own oaths or solemn declarations;—but they do not bind other parties as against him; other parties are at liberty to shew that these are spurious credentials, assumed for the purpose of disguising the real character of the vessel; and it is no inconsiderable part of the ordinary occupation of this Court to pull off this mask, and exhibit the vessel so disguised in her true character of an enemy's vessel. Now, looking at the deposition and documents, I think that no doubt can be entertained that she is an *American* vessel, at present owned by *Americans*, and only colourably transferred to a *Portuguese* for purposes of deception. It is admitted throughout all the evidence, that she had been very recently, and upon her arrival at *Madeira*, the *American* ship *William and Mary*, owned by one or more *Americans* at *New York*, from which place she had sailed under *American* colours. Two or three papers, found in a state of concealment, give an inconsistent account of the ownership of the vessel whilst she remained in *America*: for one of them, which bears date 31st *July*, describes her as the joint property of *Trenholm* (the master), and *John Ker*, and *David Shaw*, in equal parts: another document, that bears date a month before, *viz.* 1st *July*, purports to be a conveyance of her, by two persons of the name of *Ker*, to *Trenholm*, as sole proprietor. Whatever the interests of the parties might be (whether sole or joint),

The FORTUNA.

March 12th, 1811.

they were clearly *American* intereſts at the time of the ſhip's ſailing from *America*. The former of the two papers, juſt referred to, deſcribes the voyage to be to the Iſland of *Madeira*, and from thence to the *Havannah*, and from thence to any place which might become a market: ſo that the cargo was not intended to be landed at *Madeira*, as in fact it was not. It authoriſes him likewiſe to diſpoſe of the ſhip, either at *Madeira* or elſewhere. With a cargo well aſſorted for the *African* market, ſhe goes to *Madeira*, where, after delivery of a ſmall part (if that fact can be eſtabliſhed by the unconfirmed teſtimony of *Trenholm*), and after receiving on board articles of proviſion, ſhe is transferred, not only herſelf but her cargo, to a *Portugueſe* of the name of *Souza*. Is this a real transfer or not? Without all queſtion, a transfer merely in form, and hardly even that. For how does the maſter and former owner deſcribe the tranſaction to have paſſed? On the 30th interrogatory, he ſays, "that the ſhip had "been transferred to him at *New York* for the ſum of "ſix thouſand dollars, and that ſhe was transferred "by him, this deponent, to *De Souza*, at the Iſle of "*Madeira*, for the ſum of eight thouſand dollars, "which, *when paid*, will be a true and fair equiva-"lent; that the *ſame was not paid, nor any obligation* "*given him for the ſame*; that the ſaid ſale and trans-"fer was made for the advantages ſhe would receive "by being put under the *Portugueſe* flag, and *was for* "*the purpoſe of covering the real property*." Here is a direct avowal that deſcribes the tranſaction in its true nature, as no real ſale at all, as having no one feature of a real ſale—no money paid, nor any ſecurity given for future payment: and this man, who had before declined to anſwer ſome pinching interrogatories put

to

The FORTUNA.

March 12th, 1811.

to him upon the ſame ſubject, is now compelled to admit, what was unneceſſary for him to admit, after what he has already ſaid, that it *was merely for the purpoſe of covering the real property.* What ground then for deſcribing this as now having become a *Portugueſe* veſſel? This is clear, that a groſs fraud had been practiſed upon the *Portugueſe* government; for, in order to obtain the documents under which ſhe is adopted into *Portugueſe* navigation, it is eſſential to be ſhewn that the conſideration-money ſhould have been actually paid. Accordingly, in the document for naturalization of the veſſel, it is ſtated, " that the " vender ceded to the vendee his poſſeſſion and pro- " perty in the ſaid ſchooner, and *acknowledged the* " *receipt of the ſum of eight thouſand dollars*, delivering " to him, as and for a receipt for the ſaid conſidera- " tion-money, the inſtrument ſubjoined:" and that inſtrument expreſſes thus; " It appearing, by the " report of the Judge of the Cuſtoms, that the ſchooner " meaſured two hundred and twenty tons; and was " purchaſed for eight thouſand dollars, *which pur-* " *chaſe-money has been paid;* it is hereby adjudged, " and the ſchooner is qualified, under the name of the " *Fortuna*, &c. &c." So the ſubſequent inſtrument recites, " *that the conſideration money had been paid;*" whereas no ſuch money had either been paid or in any manner ſecured, though he muſt have certified it upon oath, or by ſome ſolemn declaration. Whatever, therefore, was obtained from the *Portugueſe* government, was fraudulently obtained, and under falſe pretences of a transfer, which had never taken place, and which could not, with the aid of *Portugueſe* documents ſo obtained, entitle this veſſel to any recognition of

The FORTUNA.

March 12th, 1811.

of a *Portugueſe* character. She continues ſtill an *American* veſſel.

The ſecond queſtion then is, was this *American* veſſel employed in that traffic which ſubjected the *Amedie* to a ſentence of confiſcation? I think that a variety of important circumſtances lead irreſiſtibly to that concluſion. *Trenholm*, the preſent ſupercargo (for he continues on board this veſſel in this character, after the pretended ſale of her in his character of maſter and owner), pretends, in an affidavit, that he was not to carry on the ſlave trade, but meant to diſpoſe of the cargo at the *Cape de Verde* Iſlands, or the *Brazils*. But this man's conduct is too deeply involved in the entire fraud of theſe tranſactions to claim any credit for his repreſentations. The conſtruction and furniture of the ſhip had all the accommodations neceſſary for the conduct of that trade, and of that trade only. She had platforms ready conſtructed; ſhe had timbers fit for the conſtruction of more; ſhe had iron ſhackles and bolts, and running chains and collars—all adapted for the purpoſes of conveying ſlaves—and the quantity and ſpecies of proviſion and medicine which ſuch purpoſes require. It has been ſuggeſted in argument, that the ſhip had probably been employed before as a ſlave ſhip, and that the fixed accommodations had been ſuffered to remain, though her employment was altered. But is this probable, that they would have been ſuffered to remain in a veſſel deſtined for other occupations? In other trades they would have been obſtructions and nuiſances, and the firſt thing done before ſhe left *America*, would have been to remove them. The continuance of ſuch accommodations proves the intended continuance in that trade, for they are not accommo-

accommodations in any other. In the concealed papers it is diſcloſed that ſhe was to go to the *Havannah*, the great mart for the importation of negroes. When I ſee theſe platforms conſtructed, and an apparatus for the conſtruction of more; theſe irons collected together; the nature of the proviſions on board; the fraudulent ſale, and the fraudulent acquiſition of the *Portugueſe* character under it; the falſe pretences and unjuſt reſiſtance to fair inquiry that has travelled with this caſe throughout; the particulars of which I do not detail, after the ample ſtatements of both which have been given by the advocates for the captors; I can have no rational doubt of her real character;—and, under the authority of the caſe of the *Amedie*, I condemn her and her cargo.

The FORTUNA.

March 12th, 1811.

DONNA MARIANNA.

June 30, 1812.

THIS caſe was heard upon an appeal from the Vice-Admiralty Court at *Sierra Leone*; in which court the ſhip had been condemned, together with her cargo. It appeared that the ſhip was originally an *American* veſſel, and had been purchaſed at *Liverpool* by *Macdowall* and Co. of that place, who, in *Auguſt* 1809, ſent her, under the command of a perſon of the name of *Vauralſt*, to *Madeira*, with a cargo of culm, and from thence the ſhip proceeded to *Pernambuco*. At *Pernambuco* the ſhip was ſaid to have been ſold to *De Silva*, a *Portugueſe* merchant, by whom ſhe was claimed as *Portugueſe* property. From *Pernambuco* the ſhip ſailed under *Portugueſe* colours to *Babia*, with ſome wine

Where a claim is given for a ſhip engaged in the ſlave trade on the ground that the property belongs to the ſubjects of a country which ſtill permits that trade, the Court has a right to enquire into the title of the ſhip, and the *onus probandi* lies upon the parties ſetting up the claim.

The DONNA MARIANNA.

June 3d, 1812.

wine on board (but whether the ſame wine that ſhe had brought from *Madeira* did not clearly appear); and having there taken on board a variety of goods aſſorted for the ſlave trade, ſhe proceeded to Cape *Coaſt*, where ſhe was proceeding to engage in the ſlave trade, and was ſeized at anchor. *Vauralſt*, the maſter, to whom the command of the veſſel had been originally entruſted at *Liverpool*, ſtill continued on board, but, as aſſerted, only in the capacity of a paſſenger, for the purpoſe of delivering the wine at Cape *Coaſt*.

The Court condemned the ſhip, as being a *Britiſh* veſſel engaged in the ſlave trade; and reſerved the queſtion reſpecting the cargo; to the condemnation of which it was objected that the acts of parliament applied only to goods laden in a port of *Great Britain*, or the *Britiſh* dominions, and had no reference to goods laden elſewhere, though they might be *Britiſh* owned.

46 G. 3. c. 52. § 9.
47 G. 3. c. 5. § 2.

JUDGMENT as to the ſhip.

Sir *William Scott*.—The firſt queſtion is, whether this Court is at liberty to inquire into the title of this ſhip, which was at the time of capture navigating under the *Portugueſe* flag, and has been claimed as *Portugueſe* property. It is obvious to remark, that if no ſuch authority veſts in this Court, there muſt be an end of the operation of the act of parliament. It cannot be conſidered as any hardſhip upon the ſubjects of thoſe countries which ſtill carry on the ſlave trade, that it ſhould poſſeſs ſuch a power. It can be no unconſtitutional breach of the law of nations to require, that where a claim is offered on the ground that the property

property belongs to the ſubjects of a country which ſtill permits this trade, the burthen of giving proof of the property ſhould lie upon thoſe who ſet it up; and peculiarly ſo in the caſe of a *Portugueſe* claimant, whoſe government, though it has not actually aboliſhed, has diſavowed the trade; when it is ſo univerſally known that the ſlave trade has been aboliſhed by *Great Britain*, and when it is not improbable that attempts may yet be made to carry it on under diſguiſe. It would be a monſtrous thing, where a ſhip, admitted to have been at one time *Britiſh* property, is found engaging in this traffic, to ſay, that, however imperfect the documentary evidence of the aſſerted transfer may be, and however ſtartling the other circumſtances of the caſe, no inquiry ſhall be made into the real ownerſhip. Here are on board this veſſel only papers of mere form, and which are in contradiction with each other, leaving the whole tranſaction of the transfer in great doubt and obſcurity; and if the Court were to be prohibited under ſuch circumſtances from inquiry into the reality of the *Portugueſe* title, one ſees how eaſily the proviſions of the legiſlature would be defeated. It would go to repeal the act of parliament and the principles on which it is founded. That in point of fact this is really a *Britiſh*-owned veſſel I have little doubt, as I think there are appearances enough to ſhew that the aſſerted transfer to *De Silva* was only colourable. The ſhip comes to *England*, and is there purchaſed by *Macdowall* and Co. of *Liverpool*, from whence ſhe is diſpatched on her outward voyage with fetters on board; which, as it appears to me, were put on board at *Liverpool*; the double ſtanchions were admitted to have been taken on board there; and ſhe is diſpatched under the command of *Vauralſt*, who is evidently going

The DONNA MARIANNA.

June 3d, 1812.

going to conduct a tranſaction of this nature, and for which purpoſe he accompanies the ſhip to *Africa*. I obſerve he knows nothing of any money being paid under this aſſerted transfer. I can have no doubt that this Court is bound judicially to conſider this as a *Britiſh* veſſel, and that this *Portugueſe* diſguiſe has been aſſumed for the mere purpoſe of protecting the property of *Britiſh* merchants in a traffic which it was not lawful for them to engage in. I ſhall affirm the ſentence as to the ſhip, with coſts.

June 6th, 1812.

JUDGMENT as to the cargo.

In this caſe, the Court has already diſpoſed of the queſtion as to the ſhip, which had been fitted out at *Liverpool* with ſtanchions and other accommodations neceſſary for veſſels employed in the ſlave trade. In the firſt inſtance, the ſhip proceeded to *Madeira*; and it was not till her arrival at *Pernambuco* that the *Portugueſe* flag was aſſumed: from *Pernambuco* ſhe ſailed to *Bahia*, and from thence to the *African* coaſt, the ſame maſter continuing on board, though oſtenſibly in a different capacity. The Court can have no doubt that the fraud of the *Britiſh* owners, in this caſe, involves alſo the aſſerted *Portugueſe* owners; it is impoſſible to ſever the fraud of the one party from the fraud of the other. The fraudulent intention of the party here was to be carried into effect by the fraudulent co-operation of this *De Silva*, who was to become the inſtrument of a ſimulated transfer. I do not mean to lay it down that if goods were put on board an apparently *Portugueſe* ſhip, though in reality a *Britiſh* ſhip, an innocent owner would be affected, *bonâ fide* believing that he was embarking his property on board a *Portugueſe* veſſel; but here the colourable owner of the ſhip is the

The DONNA MARIANNA.

June 6th, 1812.

asserted owner of the cargo. I consider the whole interest of the adventure to reside in the *British* merchants, and that *De Silva* is merely lending his name and agency to further a deception practised on *British* laws. Therefore I see no reason why the cargo should not follow the fate of the ship, with which it is involved in one common fraud.

DIANA, BERTHE', otherwise BARCLAY.

May 21st, 1813.

THIS vessel, under *Swedish* colours, took on board at *Gustavia*, in the island of *St. Bartholomew's*, a cargo of rum, sugar, tobacco, iron, dry goods, and powder, which she carried to *Cape Mount*, on the coast of *Africa*, where the same were exchanged for 120 slaves; and the vessel having received a number of these slaves on board at *Cape Mount*, was, on the 11th of *September* 1810, seized by His Majesty's ship *Crocodile*, *Edward Henry Columbine* Esq. commander, and carried to *Sierra Leone*, where proceedings were instituted against the vessel and cargo as a forfeiture.

The Courts of this country will respect the property of foreigners engaged in the slave trade, under the sanction of the laws of their own country.

An information was filed on the part of the captors, and a claim was given by the master for the ship and cargo as the property of *Jean Turrenne*, of the Island of *St. Bartholomew*, a subject of his Majesty the King of *Sweden*.

On the 13th of *October* the cause came on for hearing in the Vice-Admiralty Court at *Sierra Leone*, when

The DIANA.

May 21ſt, 1813.

when the judge was pleaſed to condemn the ſhip and cargo of ſlaves *as prize*.

From this ſentence the preſent appeal was proſecuted.

JUDGMENT.

Sir *W. Scott*.—This ſhip was ſeized off the coaſt of *Africa*, and carried to the *Britiſh* ſettlement of *Sierra Leone*, where ſhe was proceeded againſt and condemned in the Vice-Admiralty Court there eſtabliſhed. She was laden, at the time of capture, with a cargo of ſlaves, which had been procured at *Cape Mount*, and with which ſhe is aſſerted to have been proceeding to *St. Bartholomew*, there to import them on *Swediſh* account. I ſee no reaſon to ſuppoſe that there were any other than *Swediſh* intereſts involved in this tranſaction, or that there was any intention of landing the ſlaves at a *Britiſh* or *Portugueſe* ſettlement, or indeed at any other place than *St. Bartholomew*, the alleged port of deſtination. The requiſite number of ſlaves in that colony may not be large, but I preſume that labour upon that iſland, as upon others, is performed by ſlaves. It is impoſſible for the Court, upon mere ſurmiſe and conjecture, to ſay that the ſhip was not going to that iſland, or that ſhe was going there for the purpoſe of colour only, and with an ulterior deſtination to a *Britiſh* colony. The Court muſt look to the termination of the voyage as deſcribed in the evidence that is before it; and upon that evidence nothing ariſes to warrant a ſuſpicion that the ſhip was going elſewhere than to the *Swediſh* iſland of *St. Bartholomew*, and on *Swediſh* account. This is the fair reſult of the evidence preſented to the Court, and with this

I am bound to reſt ſatisfied. If a traffic in ſlaves requires to be more narrowly watched, and to be guarded againſt by ſecurities of another kind, it is not for a court of juſtice to invent thoſe ſecurities. It muſt be done by ſome legiſlative act, if any ſuch can be deviſed, which may not be incompatible with the rights of independent ſtates, or the general principles of legal juſtice.

The cauſe in the Court below was conducted in a manner of which it is not eaſy to give a very preciſe and definite deſcription. The proceſs which has been remitted bears a double aſpect, being in its nature half civil, half prize; commencing with a *qui tam* information, and ending with a prize ſentence, after an application of prize interrogatories. I do not heſitate to ſay, that it is as mongrel a proceeding as ever preſented itſelf to the notice of this or of any other Court. The condemnation alſo took place on a principle which this Court cannot in any manner recognize, inaſmuch as the ſentence affirms, "that the ſlave trade, from motives of humanity, hath been aboliſhed by moſt "civilized nations, *and is not at the preſent time legally* "*authorized by any.*" This appears to me to be an aſſertion by no means ſuſtainable. This Court is diſpoſed to go as far in diſcountenancing this odious traffic as the law of nations and the principles recognized by *Engliſh* tribunals will warrant it in doing, but beyond theſe principles it does not feel itſelf at liberty to travel: It cannot proceed on a ſweeping anathema of this kind againſt property belonging to the ſubjects of foreign independent ſtates. The poſition laid down in the ſentence of the Court below, that the ſlave trade is not authorized by any civilized ſtate, is unfortunately by no means correct, the contrary being notoriouſly

The DIANA.

May 21ſt, 1813.

riouſly the fact, that it is tolerated by ſome of them. This trade was at one time, we know, univerſally allowed by the different nations of *Europe*, and carried on by them to a greater or leſs extent, according to their reſpective neceſſities. *Sweden*, having but ſmall colonial poſſeſſions, did not engage very deeply in the traffic, but ſhe entered into it ſo far as her convenience required for the ſupply of her own colonies. The trade, which was generally allowed, has been ſince aboliſhed by ſome particular countries; but I am yet to learn that *Sweden** has prohibited its ſubjects from engaging in the traffic, or that ſhe has abſtained from it either in act or declaration. Our own Country, it is true, has taken a more correct view of the ſubject, and has decreed the abolition of the ſlave trade, as far as *Britiſh* ſubjects are concerned; but it claims no right of enforcing its prohibition againſt the ſubjects of thoſe ſtates which have not adopted the ſame opinion with reſpect to the injuſtice and immorality of the trade.

The principle which has been extracted by the judge of the court below, from the caſe of the *Amedie*, is

---

* The treaty of concert and ſubſidy between His Majeſty and the king of *Sweden*, which was ſigned at *Stockholm* on the 3d of *March* 1813, has been made public ſince the date of this judgement. By an article of this treaty the king of *Sweden* engages "to forbid and prohibit, at the period of the ceſſion of *Guadaloupe*, "the introduction of ſlaves from *Africa* into the ſaid iſland and the "other poſſeſſions in the *Weſt Indies* of his *Swediſh* Majeſty, and "not to permit *Swediſh* ſubjects to engage in the ſlave trade; an "engagement which (it is ſaid) his *Swediſh* Majeſty is the more "willing to contract as this traffic has never been authoriſed by "him," though it had never been prohibited, and therefore had been tolerated in practice upon the principles then generally received.

the

the reverſe of the real principle there laid down by the ſuperior Conrt, which was, that, where the municipal laws of the country to which the parties belong have prohibited the trade, the tribunals of this country will hold it to be illegal upon the general principles of juſtice and humanity, and refuſe reſtitution of the property; but, on the other hand, though they conſider the trade to be generally contrary to the principles of juſtice and humanity, where not tolerated by the laws of the country, they will reſpect the property of perſons engaged in it under the ſanction of the laws of their own country. The lords of appeal did not mean to ſet themſelves up as legiſlators for the whole world, or preſume in any manner to interfere with the commercial regulations of other ſtates, or to lay down general principles that were to overthrow their legiſlative proviſions with reſpect to the conduct of their own ſubjects. It is highly fit that the judge of the court below ſhould be corrected in the view which he has taken of this matter, ſince the doctrine laid down by him in this ſentence is inconſiſtent with the peace of this country and the rights of other ſtates.

The proceedings in this court, as of appeal, have been commenced and carried on by both parties in the manner in which *Inſtance cauſes* are uſually conducted. A libel has been brought on the one ſide, to which a negative iſſue has been given on the other. Objections, however, have been taken to the juriſdiction upon two grounds. In the firſt place it has been ſaid, that the ſentence of the court below, condemning the property to the Crown, was a *prize ſentence*, and conſequently that the appeal ought to have been made to the Privy Council, and not to the Inſtance Court of Admiralty, which is a mere municipal tribunal. It has likewiſe

The DIANA.

May 21st, 1813.

been ſaid, that, ſuppoſing this Court to be poſſeſſed of an appellate juriſdiction, ſtill it has no juriſdiction over the queſtion itſelf, which depends altogether upon the *jus gentium.* But I think the proceedings of the parties have ſufficiently founded the juriſdiction in the cauſe; and I am by no means clear that a court of civil juriſdiction might not otherwiſe have adjudicated on a queſtion of this kind, and have excluded a claim aſſerted to be founded on principles contrary to general juſtice. The general injuſtice of a claim may be the ſubject of cognizance in a municipal court: A claim founded on piracy, or any other act which in the general eſtimation of mankind is held to be illegal and immoral, might, I preſume, be rejected in any court upon that ground alone. I am of opinion, therefore, that neither of the objections which have been taken are founded. After iſſue has been given here by the captors, as in an Inſtance Court, they cannot object to the competency of the Court to entertain the queſtion, and I am by no means willing to put the parties to the expence and inconvenience of commencing proceedings *de novo* before another tribunal.

On the part of the appellants it is, I think, ſufficiently eſtabliſhed in evidence, that the ſhip and cargo are *Swediſh* property; whilſt, on the other ſide, there is nothing but a general ſuggeſtion that they may belong to *American* citizens. It may, perhaps, be true, that perſons of that country have diſhoneſtly engaged themſelves in this traffic under colour of the *Swediſh* flag, and the Iſland of *St. Bartholomew* may be a convenient reſort for ſuch an illegal purpoſe: but there is nothing in this particular caſe which can lead to a grave ſuſpicion, much leſs to a legal concluſion that this ſhip is not *bonâ fide* the property of *Swediſh* ſubjects.

The

The DIANA.

May 21ſt, 1813.

The queſtion then is, whether the ſlave trade is permitted by the law of *Sweden*. I have before ſtated that this trade was, till of late years, generally allowed by the ſtates of *Europe*, when, from motives of humanity, ſome of them were induced to aboliſh it, as far as their own ſubjects were concerned. It does not appear that any thing has been done by *Sweden* in the way of abjuring it, much leſs that ſhe has iſſued any poſitive declaration to that effect. The Court is certainly inclined to hold that it lies on the individual making the claim to ſhew that the law of his country countenances the trade; but, in this particular inſtance, that demand appears to be ſatisfied; ſufficiently, at leaſt, to throw on the other party the *onus* of proving that it is not ſo allowed. The endorſement upon the paſs ſigned by the *Swediſh* Governor, that this veſſel was "bound to the Coaſt of *Guinea*, *for ſlaves*," raiſes a preſumption of the legality of the trade, and ſhifts the burthen of proof from the claimant to the captor. It is not neceſſary that there ſhould be an immediate act of the *Swediſh* Government itſelf on board, declaring what the preciſe ſtate of the law may be; the Court is bound to accept the declaration and authority of the governor as it appears upon the paſs, if not contradicted. I do not find that the authenticity of this paſs is at all denied by the judge of the Court below; he goes on the broad and ſweeping ground, *that all dealing in ſlaves is unlawful becauſe the trade is not authorized by any civilized ſtate*, which is certainly an incorrect and erroneous ſtatement. If the captors had it in their power to prove, that *Sweden* had aboliſhed this trade, they ſhould now have produced that proof; for they muſt have been aware, that the ſentence of the judge could never be ſupported

The DIANA.

May 21st, 1813.

on the principles ſtated by him in his judgement. The ſanction of the colonial governor has been produced by the claimants, and I am clearly of opinion, under this authority ſtanding before me, and ſtanding uncontradicted, that *Sweden* has not aboliſhed the ſlave trade.

The King's Advocate.—From private information I underſtand, that *Sweden* never at any time engaged in this trade.

Court.—Have you any documents to produce by which that fact can be made to appear? Can I preſume, that the *Swediſh* Governor, who granted this paſs, was acting contrary to the laws of his own country? It is impoſſible for me, upon mere private information, to ſay that ſuch was the fact. If any thing can be produced in the way of evidence, it muſt be offered to the Court before which this caſe may be carried on appeal. With every diſpoſition to ſuſtain the diſinclination which has of late been juſtly ſhewn to the ſlave trade, I feel myſelf under a neceſſity of reverſing this ſentence, which appears to be founded on a falſe and dangerous principle, inconſiſtent with the rights of independent ſtates, and conſequently with the peace and ſafety of this country.

The only remaining point is, reſpecting theſe few *Portugueſe* ſlaves, which were found on board this ſhip. It appears, that they belong to the maſter of a *Portugueſe* ſchooner, which had been lying at *Cape Mount*, but was driven to ſea by ſtreſs of weather, whilſt he was on ſhore, and that himſelf and his ſlaves had been taken on board this ſhip out of charity.—In the abſence of all proof I ſhall not preſume that he had

had been acting in oppoſition to the laws of his own country, and the treaty relative to the ſlave trade between *Great Britain* and *Portugal*.—— Sentence reverſed.

The DIANA.

May 21ſt, 1813.

DRUMMOND, LANGDON.

October 31ſt, 1811.

THIS was the caſe of a veſſel under *American* colours, which was captured on the 27th of *Auguſt* 1811, whilſt in the proſecution of a voyage from *New York* to *Bourdeaux*, to which place ſhe was aſſerted to be carrying diſpatches from the Preſident of the United States to the *American Chargè des Affaires* reſident in *France*. The ſhip was ſailing in ballaſt at the time of capture, but there were ſeventeen paſſengers on board, ſome of whom the maſter deſcribed to be *American* citizens; and with reſpect to the others, expreſſed a belief that they were *French* refugees, from *St. Domingo*, but could give no account of their rank, profeſſion, or occupation.

A neutral merchant veſſel aſſerted to be carrying diſpatches for the Government of its own country, cannot ſet up that employment as a ground of protection for a voyage otherwiſe illegal; and even when ſuch a claim ſhall be given on the part of the Government, it may become a ſerious queſtion, how far a neutral ſtate poſſeſſes the right of imparting ſuch a protection.

JUDGMENT.

Sir *W. Scott*.—This ſhip was taken on a voyage from *New York* to *Bourdeaux*, with ſeveral paſſengers on board, ſome of whom are deſcribed by the maſter as *French* refugees from the iſland of *St. Domingo*. On what ground he deſcribes them to be refugees, does not at all appear; I can only conſider them as *French* perſons, who were deſirous of returning from the colony to the mother-country, and who applied to the compaſſion of this maſter for the purpoſe of obtaining

The DRUMMOND.

October 31ſt, 1811.

a conveyance. Some of them, it is true, are women and children, but the others may be perſons of the moſt noxious character; they may form a part of the military eſtabliſhment of the enemy, or be employed upon other ſervices moſt injurious to the intereſts of this country.

The maſter ſtates alſo, that he had diſpatches on board from the Preſident of the United States to the *American* miniſter at *Paris*; but the diſpatches themſelves are not produced. Where are they? What is become of them? *Non conſtat* that any ſuch diſpatches were ever in exiſtence. It is not very probable that papers of this deſcription ſhould have been entruſted to the maſter of a common merchant veſſel. No interpoſition is made on the part of the *American* government; nor is the fact made to appear in ſuch a way as to call upon the Court to examine the queſtion, how far ſuch a mode of conveying diſpatches can be permitted. This country makes no pretenſion to any right of interrupting the communication of the *American* government with its miniſter; and I ſhould certainly be extremely tender of interpoſing any difficulties in the way of ſuch a correſpondence. At the ſame time it muſt be recollected that diſpatches are uſually carried in a public manner, in veſſels commiſſioned by the ſtate for this purpoſe, and veſted with the character of packets. Whether the Court would be bound to admit that a merchant veſſel can be protected by the mere act of carrying papers of this deſcription, is a point which I am not under the neceſſity of deciding before the queſtion ſhall be raiſed by a claim given on the part of the government. It is not for a merchant veſſel to ſet up ſuch a ground of protection. When the pretenſion ſhall be brought forward on the part of the government,

The DRUMMOND.

October 31ſt, 1811.

government, it may become a very ſerious queſtion, how far a neutral ſtate poſſeſſes the right of imparting ſuch a protection to a merchant veſſel engaged in a tranſaction otherwiſe illegal. But no ſuch claim has been given in the preſent caſe. No ſuch papers are before the Court, nor is any ſatisfactory excuſe offered for their non-production. The probability is, that no ſuch papers were entruſted to the care of this individual maſter, or of any other perſon on board this ſhip. I ſee nothing to take this caſe out of the general rule applying to ſhips concerned in ſimilar voyages; and I therefore pronounce this ſhip to be ſubject to condemnation.

CEYLON, MULAC.

November 15th, 1811.

The employment of a veſſel in the public military ſervice of the Enemy, by thoſe who have competent authority ſo to employ her, is a ſufficient "Setting forth for war" under the prize act, though the veſſel may not have been furniſhed with any formal commiſſion of war.

THIS was the caſe of an *Engliſh Eaſt India* ſhip, which had been captured by ſome *French* frigates, and carried to the Iſle of *Johanna*, where ſhe was refitted and ſupplied with two additional carronades, and a *French* crew conſiſting of ſeventy men. From the Iſland of *Johanna* ſhe was conveyed by the *French* captors to *Port South-Eaſt*, in the Iſle of *France*; on her arrival off that place ſhe was attacked by the *Britiſh* frigate the *Nereid* and the guns of the *Iſle du Paſſe*, and having fired ſeveral ſhot in return at the frigate and fort, ſhe paſſed on to her anchorage at *Port South-Eaſt*; whilſt lying in that port, ſhe was again attacked by the *Britiſh* ſquadron employed in the blockade of the *Iſle of France*, when, with the aſſiſtance of ſome other *French* ſhips, ſhe ſucceeded in repelling the attack

The CEYLON.

November 15th, 1811.

attack, and in taking and deſtroying the *Britiſh* ſquadron. She was afterwards carried round to *Port Napoleon*, where ſhe was diſmantled, and fitted out as a priſon-ſhip, for the purpoſe of receiving *Engliſh* priſoners of war, in which ſtate ſhe was found at the time of the capture of the iſland. The queſtion was, whether, under theſe circumſtances, the ſhip was ſufficiently ſet forth for war to come within the terms of the prize-act, which directs reſtitution, upon ſalvage, of *Britiſh* ſhips recaptured from the enemy, unleſs they ſhall have been "ſet forth as ſhips or veſſels of "war by the enemy."

45 G. 3. c. 72.

November 1ſt.

On a former day, the Judge thinking the evidence adduced not ſufficient to eſtabliſh the facts of the caſe, directed the cauſe to ſtand over, for the purpoſe of admitting further evidence, or of affording ſome explanation why the proper evidence had not been ſupplied.

Affidavits were now exhibited, ſtating the circumſtances attending the capture of this ſhip, her ſubſequent employment by the enemy, and the belief of the witneſſes as to the ſtate in which ſhe was found at the time of recapture.

On behalf of the former Britiſh owners, the Advocate of the Admiralty and Stoddart.—The affidavits now produced before the Court prove it to have been the original intention of the *French* captors to carry this ſhip to *Port Napoleon*; they prove likewiſe, that ſhe was there diſmantled and diſarmed for the purpoſe of being uſed as a priſon-ſhip, and that ſhe was not either commiſſioned or ſent forth as a ſhip of war during the time ſhe was in the poſſeſſion of the enemy. No affidavits have been offered on the other ſide, nor have the captors attempted to ſhew, by

The CEYLON.

November 15th, 1811.

by any ſpecies of evidence, that a commiſſion of war was at any time granted for this ſhip. The iſland of *Johanna*, to which ſhe was in the firſt inſtance carried, is a place in which a ſhip cannot be fitted out for war; it is a general neutral port in the hands of the natives, not a military ſtation in the poſſeſſion or under the control of the *French* Government. There was no *depôt* of naval ſtores at the place, by means of which the veſſel could have been fitted out for a cruiſe; ſhe could there procure only refreſhment and temporary repairs, juſt enough to enable her to ſail for the *Iſle of France*. The engagement which ſhe ſuſtained againſt an *Engliſh* force, whilſt in the proſecution of her voyage to that iſland, was a mere *defenſive* operation; ſhe was attacked by the *Britiſh* frigate and the fort, and having fired a few ſhot in her own defence, paſſed on to her anchorage. The next operation in which the veſſel was engaged was of the ſame *defenſive* kind.—She was lying anchored at *Port South-Eaſt*, when ſhe was again aſſailed by ſome *Britiſh* frigates, and, in conjunction with other *French* ſhips and the fort, again ſucceeded in repelling the attack. With reſpect to *Britiſh* property recaptured from the enemy, the general rule of law is, reſtitution upon ſalvage, and any exception to this general rule muſt be ſtrictly made out. The policy of the law places the right of captors to condemnation on the ſame ground as their right to head-money; and that has never been decreed to captors, unleſs in caſes where a regular commiſſion of war had been granted by the enemy, or at leaſt an appointment in the nature of a commiſſion by the miniſter of marine. It was ſo ruled in the caſe of ſeveral *Dutch* armed veſſels, in *June* 1805.—The Court there ſaid, "They may be armed only for their own de- 6 Robinſon, 48.

"fence;

The CEYSON.

November 15th, 1811.

" fence; as they have no commiſſion to act offenſively, " they cannot be conſidered legally as ſhips of war to " the effect of entitling captors to head-money." So in the caſe of a *Spaniſh* armed packet, belonging to the King of *Spain*, the Court ſaid, " That it was " neceſſary that the veſſel ſhould have been a com- " miſſioned veſſel of war to warrant the Court to pro- " nounce for head-money under the act of parliament."

6 Robinſon, 48.

6 Robinſon, 320.

The *Horatio Nelſon*, though originally an armed veſſel, and ſupplied with an additional number of men by the enemy, was reſtored upon ſalvage, on the ground of not being furniſhed with a commiſſion of war. In the caſe of the *Noſtra Signora del Roſario*, the Court expreſsly aſked whether there was any commiſſion of war, and being anſwered in the affirmative, proceeded to condemn the veſſel to the captors on that ground. In the caſe of the *Santa Brigada*, the captain of the re-captured veſſel deſcribed himſelf to have been " appointed " by the miniſter of marine," and the Court thinking that circumſtance ſufficient to ſhew that it was a naval military appointment, refuſed reſtitution to the *Britiſh* owners. It was proved, in the caſe of the *Caſtor*, before the Lords of Appeal, in the year 1795, that the commander of that ſhip was furniſhed with a commiſſion of war from the admiral at the time of her recapture. The *Victoria*, before the ſame Court, in *July* 1810, and the *Grand Duke of Berg*, before the Court of Admiralty, in *April* 1809, were caſes of the ſame deſcription. In the *L'Actif*, *Lorrial*, *January* 1810, and the *Alcide*, in *November* of the ſame year, there had been commiſſions, though they were withdrawn before the time of recapture. In every one of theſe caſes, in which condemnation paſſed to the captors, there either was at the time, or had been, a commiſ-

3 Robinſon, 10.

3 Robinſon, 56.

Edwards, 185.

ſion

tion of war, or an appointment by the miniſter of marine, which was conſidered equivalent to a commiſſion. A commiſſion, therefore, or ſomething tantamount to it, muſt, at ſome time or other, have been granted by the enemy, and the mere employment of a ſhip for the purpoſes of war is not a ſufficient "ſetting "forth for war," under the act of parliament, to diveſt the *Britiſh* owners of their property.

It may be queſtioned, however, whether the preſent caſe comes at all within the proviſions of this ſection of the Prize Act, which relates only to property recaptured "by any of His Majeſty's ſhips of war, pri-"vateer, or other ſhip, veſſel, or boat." This was a recapture effected by a conjoint force of the army and navy; the Court, therefore, has no power to condemn the ſhip as prize to the recaptors, but is bound to act upon the old rule of law, which, as before ſtated, directs reſtitution upon ſalvage. Reſtitution upon ſalvage appears to have been the original, and as it were the common law right upon the ſubject. Sir *Leoline Jenkins* * ſo ſtates it to be, in a report addreſſed by him to the commiſſioners of prizes, in 1762; and alſo in another report, addreſſed to the King in council, in the ſame year, he conſiders this to be the true rule of law, "not only becauſe it hath more of "natural equity in it, and becauſe the modern laws "and practice are exceeding favourable to navigation "and traffic, but alſo, becauſe he takes it to have been "*the conſtant practice in the Admiralty of England.*"

* Life of Sir L. Jenkins, vol. ii. p. 770.

From

The CEYLON.

November 15th, 1811.

From *Scobel's* acts and ordinances it appears, that the ſame rule prevailed during the time of the Uſurpation. By the ordinance 1649-29, ſhips retaken from the enemy are directed to be reſtored to the former owners, upon payment of one-eighth of the value for ſalvage, unleſs they have been "ſet forth as men of "war," in which caſe a moiety is given; and by ordinances, 1650, 28 and 33, "if furniſhed and ſet "forth as men of war," they are directed to be reſtored in like manner, upon payment of a moiety for ſalvage. By ſtatute 13 *Geo.* 2. *c.* 4. § 18. *Britiſh* property recaptured from the enemy by any of His Majeſty's ſhips, is in all caſes to be reſtored, upon payment of one-eighth of the value for ſalvage; if retaken by a privateer, before it had been in poſſeſſion of the enemy twenty-four hours, one-eighth was given; if above twenty-four hours and under forty-eight, a fifth; if above forty-eight and under ninety-ſix hours, a third; and if it remained in the poſſeſſion of the enemy above ninety-ſix hours, or had been by them ſet forth as a man of war, then a moiety of the value was to be paid for ſalvage, and the property to be reſtored to the former owners. By ſtatute 17 *Geo.* 2. *c.* 34. § 20. the ſame proviſions were continued.—By 19 *Geo.* 3. *c.* 67. § 44. *Britiſh* property was directed to be reſtored upon payment of one-eighth ſalvage in all caſes, unleſs the recaptured ſhip had "been ſet forth as a man of war" by the enemy, and then a moiety was to be paid for ſalvage. It was under ſtatutes paſſed at a very late period, that, in any caſe whatever, *Britiſh* ſhips recaptured from the enemy were to be adjudged lawful prize to the recaptors. It is ſubmitted, that the preſent caſe is not within the proviſions of thoſe ſtatutes,

43 G. 3. c. 160. & 45 G. 3. c. 72.

and

and that the former owners are entitled to reſtitution upon payment of the uſual ſalvage.

The CEYLON.

November 15th, 1811.

For the captors, the King's Advocate and Jenner.— The employment of a ſhip for the purpoſes of war by thoſe who have competent authority ſo to employ her, muſt at all times be deciſive of her character. This ſhip was carried to the Iſle of *Johanna*, where ſhe was ſupplied with additional guns and a *French* crew: this alone would be a ſufficient "ſetting forth for war" to ſatisfy the terms of the prize act. It is perfectly immaterial whether that iſland is under the dominion of *France*, or in the poſſeſſion of the natives, who permitted the *French* to fit out this ſhip in their ports; of as little conſequence is it, whether the additional guns were ſupplied from a public naval *depôt* of the enemy, or from any other prize ſhip that had fallen into their hands: the important fact is, that ſhe was ſo ſupplied and fitted out for war. If any doubt could be entertained as to the character of this ſhip, the engagements which ſhe afterwards ſuſtained with the *Engliſh* ſquadron would be deciſive upon that point. At the time of recapture the ſhip was employed in the defence of the iſland, and muſt, on that account alone, be conſidered as conſtituting a part of the national marine force of the enemy. The Court has always looked to the actual employment of the veſſel, and not to any technical rule, in order to decide upon its real character. The queſtion is, whether in point of fact ſhe formed a part of the naval force of the enemy, not whether ſhe was ſupplied with a formal commiſſion of war. It has been ſaid, that the ſhip was diſmantled, and uſed as a mere priſon ſhip, but it was was for *priſoners of war* that ſhe was ſo uſed. If the caſe does

The CEYLON.

come within the provisions of the prize act, the recaptors are entitled to condemnation under the general principle of law, as laid down by the Court in the case of the *L'Actif, Lorrial.*

November 15th, 1811. Edw. Rep. 185.

JUDGMENT.

November 26th,

Sir *W. Scott.*—This ship is alledged to have been retaken by His Majesty's land and sea forces employed in the capture of the Isle of *France.* The circumstances attending the recapture are very imperfectly detailed in the evidence before the Court, no person who was present at the recapture being produced as a witness. It is certainly the first time in which a cause of this kind ever came on for hearing in such a form: however, this is a defect which cannot now be supplied; and I can only understand generally, that the ship was employed, in conjunction with other vessels, in defence of the Isle of *France* against the *British* assailants.

A claim has been given for this ship, so taken and so employed, on behalf of the former *British* proprietors. The former master states the circumstances under which the ship was taken by the enemy. He says, " that she was taken and seized on the 3d *July* " 1810, within sight of the Isle of *Johanna*, in the " *Indian* sea, by the *Bellone* and *Minerve French* fri- " gates of war, and the *French* corvette of war *Victor*, " after a very severe engagement of five hours and a " half, during which many guns were fired on both " sides.—That the said ship was an *English East India* " ship sailing under *English* colours; that the ship and " goods were afterwards carried into the Island of " *Johanna*, where she was refitted and had additional " guns put on board by the *French*, by whom she was " afterwards conveyed to the *Isle of France*; that on

November 26th 1811.

" her arrival at *Port South-East*, on the 20th of " *August* 1810, she was attacked by the *Nereid British* " frigate and the guns of the *Isle du Passe*, then in " possession of the *English*; that she fired several shot " at the frigate and fort, and then passed on to her " anchorage at *South-East Point*; that the deponent " was afterwards put on shore, but was present on the " 24th and 25th days of the aforesaid month of *August*, " when the said ship being still at her anchorage in " *Port South-East*, was engaged in action against the " *English* blockading squadron, under the command " of Captain *Pym*, of the *Sirius*, which, with the " *Magicienne*, another *English* frigate, were both burnt, " and the *Nereid English* frigate taken, and the *Iphi-* " *genie* surrendered; and which was effected by the " exertions of the two *French* frigates and corvette by " which the deponent was captured, assisted as afore- " said by the *French* crew, which had been put on " board the deponent's ship; that the deponent was " afterwards conveyed from *Port South-East*, where " he left the *Ceylon*, on the 15th of *September* in a " cartel, in consequence of his having been exchanged; " but the deponent has heard, and believes, that the " *Ceylon* was afterwards carried round to *Port Napo-* " *leon*, where she was unladen, dismantled, and fitted " out as a prison-ship, for the purpose of receiving " *English* prisoners of war, and in which state she was " found at the time of the capture of the island." It appears that she was a very large ship, of the burthen of eight hundred tons; that she had on board twenty-six guns, and one hundred and ten men, with arms, and ammunition of every description, in sufficient quantities for offensive or defensive operations: it ap-

The CEYLON.

November 26th, 1811.

pears alſo, that ſhe was furniſhed with a *Britiſh* letter of marque, empowering her to make repriſals. Now the queſtion for the determination of the Court is, whether, under the words of the act of parliament, ſhe is "ſufficiently ſet forth for war" by the enemy. I am of opinion that ſhe is. "Setting forth" does not, I think, neceſſarily mean *ſending out of port*. It is no neceſſary part of the interpretation, that ſhe ſhould have been carried into port and ſent out with a formal and regular commiſſion; it is ſufficient, if ſhe has been uſed in the operations of war, and conſtituted a part of the naval military force of the enemy. *Non conſtat* that there was not a regular commiſſion of war in the preſent caſe; that muſt remain matter of conjecture only, ſince all the ſhip's papers are loſt. I hold it, however, to be unneceſſary that ſhe ſhould have been regularly commiſſioned; it is enough, that ſhe was employed in the public military ſervice of the enemy by thoſe who had competent authority ſo to employ her. In the caſe of *Caſtor*, which ſhip was not carried into port, there was no regular commiſſion, for it is not in the power of the admiral to grant a regular commiſſion; He has only an inchoate authority for ſuch a purpoſe, and his acts neceſſarily require confirmation: yet in that caſe it was held, that the ſhip, though commiſſioned by the admiral alone, was ſufficiently clothed with the character of a veſſel of war. A commiſſion of war is concluſive of itſelf as to the character of a ſhip; but it by no means follows, that a regular and formal commiſſion is in all caſes indiſpenſable. The want of ſuch an inſtrument is not fatal; it may be ſupplied in various ways by acts equivalent to a commiſſion. What are the facts in the preſent caſe?

Lords of Appeal, May 1795.

The CEYLON.

November 26th 1811.

caſe? There was, indeed, no great additional armament, for that was unneceſſary, the ſhip having been already armed in the ſervice of this country, but two guns, it appears, were added out of the ſtores of other veſſels to thoſe which were originally on board. She ſailed with a Lieutenant *de Vaiſſeau*, a perſon having a military commiſſion, and a complement of men capable of fighting the ſhip; for it appears that ſhe did fight the *Britiſh* frigate the *Nereide*, by which ſhe was attacked. It is ſaid, theſe were mere defenſive operations; but are not many of the operations of war defenſive? If the *Nereide* had proved inferior in force, would not this ſhip, in conjunction with the others, have carried the matter further, and attacked in her turn? Then, being arrived at the *Iſle of France*, ſhe again ſuſtained an engagement with other *Britiſh* ſhips, and aſſiſted in the deſtruction of the *Sirius* and the *Magicienne*, and in the capture of two other *Engliſh* frigates. Here, then, was an operation not merely defenſive, but an actual offenſive attack, terminating in the deſtruction of the *Britiſh* blockading ſquadron. I cannot doubt, under theſe circumſtances, that this ſhip was ſufficiently "ſet forth for war" to ſatisfy the terms of the act, or, as the marginal note of the act expreſſes it, *uſed as a ſhip of war*. As little doubt can I have that ſhe was ſo uſed under competent authority. We know extremely well that, in remote parts of the world, where the domeſtic authority cannot be immediately reſorted to, the commanders are, of neceſſity, veſted with larger powers than is uſually entruſted to them when employed upon *European* ſtations. I think this veſſel was ſufficiently commiſſioned by the *French* commander on that ſtation; this Lieutenant *de Vaiſſeau*

The CEYLON.

November 26th, 1811.

and the ſeventy men were put on board by his order in the firſt inſtance, ſubject, undoubtedly, to the approbation of the *French* miniſter of marine; but can I doubt that this appointment would have been confirmed by the conſtituted authorities at home in the preſent ſituation of the *French* navy? What was her after-employment? why as a priſon-ſhip, as other ſhips of war frequently are, and, laſtly, in defence of the place. This converſion is in itſelf ſufficient to ſhow that a regular commiſſion is not neceſſary: there cannot be ſtronger proof of an actual military character being impreſſed upon her; and I have no heſitation in ſaying, that ſhe was ſufficiently "ſet forth for war." Then it is ſaid, there is no proof of the condemnation of this ſhip by a competent court; but this Court is bound to preſume that ſhe was regularly condemned when ſhe remained ſo long in the poſſeſſion of the enemy.

Another queſtion has been raiſed, whether this is a recapture under the act of parliament; and it is ſaid not to be within the proviſions of the act, becauſe that ſpeaks of recaptures by boats and ſhips only, and this is a recapture effected by the conjunct operation of the army and navy. Now we know very well that the act was drawn with the intention of expreſſing the ſenſe and meaning of the law of nations as it at preſent exiſts. But it cannot be forgotten that, by the ancient law of *Europe*, the *perductio infra præſidia*, *infra locum tutum*, was a ſufficient converſion of the property; that, by a later law, a poſſeſſion of twenty-four hours was ſufficient to diveſt the former owner. This is laid down in the 287th article of the *Conſolato del Mare*, in terms, indeed, not very intelligible in themſelves, but which

are satisfactorily explained by *Grotius* *, and by his commentator *Barbeyrac*, in his notes upon that article †. *Bynkershoek* lays it down to the same effect in these words: "*Sane in libro, qui inscribitur* Consulatus Maris, "c. 287 *ita, ut modo dicebam, res definita est: nam* "*is, qui navem et onus ab hoste recuperavit, jubetur* "*navem et onus restituere pristino domino, salvo tamen* "*servaticio, idque servaticium ut justum sit, constituitur* "*pro modo operæ et impensæ in recuperationem factæ,* "*præteritâ omni distinctione, quamdiu navis onusque in* "*potestate hostium fuerint. Recte autem ibi additur,* "*eam restitutionem duntaxat obtinere, si navis nondum* "*fucrit deducta in locum tutum, sed si in locum tutum,* "*dominio sic plane et plene in hostem translato, navem* "*merceſque deinde recuperatas, ex asse recuperatori* "*cedere. Quæ apprime conveniunt cum his, quæ hoc* "*capite disputavimus. Vellem omnia, quæ in illa far-* "*ragine legum nauticarum reperiuntur, æque proba* "*recta essent, sed non omnia ibi sunt tam bonæ frugis.*" *Grotius* ‡ expresses himself very much to the same effect, and *Loccenius* § considers this rule as the general

* Cui consequens esse videtur, ut in mari naves, etres aliæ, captæ censeantur tum demum, cum in navalia aut portus, aut ad eum locum ubi tota classis se tenet, perducta sunt: nam tunc desperari incipit recuperatio, sed recentiori jure gentium inter Europæos populos introductum videmus, ut talia capta censeantur ubi *per horas viginti quatuor* in potestate hostium fuerint.—Grotius de Jure Belli ac Pacis, lib. 3. cap. 6. sec. 3.

† Lib. 1. cap. 5.

‡ Lib. 3. cap. 6.

§ Hodie naves ab hoste captæ, communi inter Christianos et Europæos populos sive jure sive consuetudine postliminio non recipiuntur, si hostis eas non eodem die navali pugnâ iterum amisit, sed per viginti quatuor horas in potestate victoris fuerint. Tunc enim verè captæ, et proprii juris factæ censentur.—Loccenius de Jure Maritimo, lib. 2. cap. 4. sec. 4.

The CEYLON.

November 26th, 1811.

law of *Europe*. In Lord *Stair*'s * deciſions alſo the ſame rule is laid down as the rule of law in *Scotland*. According to *Valin* †, a ſimilar practice prevailed in *France*; and *Crompton* §, in his Treatiſe on Courts, ſtates it as the ancient law of this country, that a poſſeſſion of twenty-four hours was a ſufficient converſion of the property, and that the owner was diveſted of his property unleſs it was reclaimed *ante occaſum ſolis*. So that, according to the ancient law of *England*, which was in uniſon with the ancient law of *Europe*, there was a total obliteration of the rights of former owners. It is true that this rule has ſince been receded from by this country, when its commerce increaſed. During the time of the Uſurpation, when *England* was becoming commercial, an alteration was effected by the Ordinance of 1649, which directed a reſtitution upon ſalvage to *Britiſh* ſubjects; and the ſame indulgent rule of law was continued afterwards, when this country became ſtill more commercial: but the common law ſtill prevailed, and controlled the proviſions of the ſtatute, where the enemy had fitted out the prize as a ſhip of war. In the moſt recent change of the law, it is determined, that a veſſel belonging to a *Britiſh* ſubject loſes her character on capture by the

---

* Vol. ii. p. 507., 15th February 1677.—King's advocate *contra* Rankin.

† Si aucun navire de nos ſujets eſt repris ſur nos ennemis après qu'il aura demeuré entre leurs mains pendant *vingt-quatre heures*, la priſe en ſera bonne: et ſi elle eſt faite avant les vingt-quatre heures il ſera reſtitué au propriétaire avec tout ce qui étoit dedans, à la réſerve du tiers qui ſera donné au navire qui aura fait la recouſſe.—Ordonnance 1681, ſec. 8. Valin, liv. 3. tit. 9. art. 8. tom. 2. p. 255.

§ Title, Court de Admiraltie d'Engleterre, p. 91.

enemy,

The CEYLON.

November 26th, 1811.

enemy, and subsequent conversion into a ship of war. That being the case, what is there that stands in the way of the right of the recaptor? Why, it is said, that the act of parliament only mentions recaptures by ships and boats, and not such as are effected by the assistance of land forces. The act, though it only mentions the *usual mode* of recapture at sea, does not, and cannot, mean to exclude other modes of recapture. What is the peculiar merit of a recapture where boats have been employed? The essential facts must be the same, and no difference can exist but in such circumstances as are perfectly immaterial to the merits of the transaction; and in the present case, it is highly probable that a maritime force was actually employed. The means of boats were, I must presume, resorted to for the purpose of taking possession. It is perfectly true, that in some clauses of the act, distinctions are made as to conjoint operations: but for what purpose are these introduced? For the benefit of the joint captors, in order to settle their respective interests, and not to change the nature of the capture in favour of the former proprietors. But even if the Court could be of opinion, that this case did not fall within the act of parliament, it must still consider it to come under the old rule of the law of nations, by which the rights of the owner would be completely divested; though I hardly think it necessary to have resort to that original principle. I am clearly of opinion, that this ship must, under the provisions of the prize act itself, be condemned to the recaptors.

December 5th, 1811.

TORTOLA, M'KIE.

Navigation laws, breach of—when a veſſel enters a colonial port with goods partly permitted and partly prohibited, and without any mention in her clearance of an ulterior deſtination, the preſumption of law is that all the goods were coming for importation.

BY ſtatute 15 *Car.* II. *c.* 7. *ſ.* 6. it is enacted, "That "no commodity, of the growth, production, or "manufacture of *Europe*, ſhall be imported into any "land, iſland, plantation, colony, territory, or place "to His Majeſty belonging, or which ſhall hereafter "belong unto or be in the poſſeſſion of His Majeſty, "his heirs or ſucceſſors, in *Aſia*, *Africa*, or *America*, "but what ſhall be *bonâ fide* and without fraud laden "and ſhipped in *England*, *Wales*, or the Town of "*Berwick-upon-Tweed*, and in *Engliſh*-built ſhipping, "and whereof the maſter and three-fourths of the ma-"riners, at leaſt, are *Engliſh*; and which ſhall be carried "directly thence to the ſaid lands, iſlands, plantations, "colonies, territories, or places, and from no other "place or places whatſoever, under the penalty of the "loſs of all ſuch commodities, of the growth, pro-"duction, or manufacture of Europe, as ſhall be "imported into any of them from any other place "whatſoever, by land or water; and if by water, of "the ſhip or veſſel alſo in which they were imported, "with all her guns, tackle, furniture, ammunition, "and apparel."

By ſtatute 4 *Geo.* III. *c.* 15. *ſ.* 36. "To prevent the "concealing any goods in falſe packages, or private "places, on board any ſhip or veſſel arriving at any "of the *Britiſh* colonies or plantations in *America*, "with intent to their being clandeſtinely landed there, "it is enacted, that all goods which ſhall be found "concealed in any place whatſoever on board any

"ſuch

" ſuch ſhip or veſſel, at any time after the maſter " thereof ſhall have made his report to the collector, " or other proper officer of the cuſtoms, and which " ſhall not be compriſed or mentioned in the ſaid " report, ſhall be forfeited and loſt, and ſhall and may " be ſeized and proſecuted by any officer of the " cuſtoms."

By ſtatute 28 *Geo.* III. *c.* 6. *ſ.* 1. it is enacted, " That " no goods or commodities whatever ſhall be imported " or brought from any of the territories belonging to " the United States of *America* into any of His Ma- " jeſty's *Weſt India* Iſlands, under the penalty of the " forfeiture thereof, and alſo of the ſhip or veſſel in " which the ſame ſhall be ſo imported or brought, " together with all her guns, furniture, ammunition, " tackle, and apparel, except tobacco, pitch, tar, " turpentine, hemp, flax, maſts, yards, bowſprits, " ſtaves, heading boards, timber, ſhingles, and lum- " ber of any ſort; horſes, neat cattle, ſheep, hogs, " poultry, and live ſtock of any ſort; bread, biſcuit, " flour, peas, beans, potatoes, wheat, rice, oats, " barley, and grain of any ſort; ſuch commodities " reſpectively being the growth or production of any " of the territories of the ſaid United States of " *America*."

On *Saturday* the 5th of *Auguſt* 1809 this veſſel, under *American* colours, and owned by Mrs. *Cunningham* of *New York*, arrived at *St. Croix*, having on board ſome articles which are admiſſible by ſtatute 46 *Geo.* III. *c.* 111. (*viz.* corn, meal, and ſtaves) and the following goods, lard, cod-fiſh, claret, pork, ſweet-oil, ſoap, boots, ſaddles, bridles, cotton bagging, raiſins, cutlery, and medicines. The maſter landed

The TORTOLA.

December 5th, 1811.

landed about 10 A. M. on the ſame day, but made no report of his ſhip until *Monday* the 7th, and did not then report any part of the cargo for exportation. It appeared to the collector of the cuſtoms at the port, that the claret, being an *European* commodity, was forfeited, with the veſſel, by ſtatute 15 *Car.* II. that all the above-mentioned goods were, with the ſhip, forfeited by ſtatute 4 *Geo.* III.: he, therefore, directed one of the ſubordinate officers of the cuſtoms to ſeize the brig and the before-mentioned goods, which ſeizure was accordingly made.

c. 7. ſ. 6.

c. 15. ſ. 36.

Proceedings were duly inſtituted in the Court of Vice-Admiralty in the iſland, and a claim was given by the ſupercargo, on behalf of Mrs. *Cunningham* of *New York*, for the ſhip; on behalf of *George Bamwall* of the ſame place, for the principal part of the goods; and on behalf of the maſter and mate for the reſidue.

On behalf of the claimants it was alleged, that only the corn, meal, and ſtaves, were intended to be landed at *St. Croix*; and that the reſt of the cargo was deſtined for *Aux Cayes* in *St. Domingo*, to which place *Hylton*, the ſupercargo was proceeding, for the purpoſe of ſettling the affairs of Mrs. *Cunningham*'s deceaſed huſband; that, by reaſon of the *American* non-intercourſe act, a clearance could not be obtained at *New York* for *St. Domingo*, which was deemed a revolted colony of *France*; that the brig was therefore cleared for *St. Croix*, and bond was given not to proceed to any port of the dependencies of *France*; that on the voyage from *New York* the brig ſprang a leak, which made it neceſſary to land the whole cargo at *St. Croix*; that he

he could not report her at the Cuſtom-houſe until he had ſeen one *M'Cormick*, to whom he had letters, and whom he could not ſee until after the Cuſtom-houſe was ſhut, on the 5th of *Auguſt*; that on the 7th he, the maſter, and *M'Cormick*, went to the Cuſtom-houſe, and ſaw the collector's clerk, to whom *M'Cormick* delivered an unſigned manifeſt of the cargo, and aſked leave, on account of the leaky condition of the brig, to land the cargo; to which the clerk replied, that ſome of the articles were inadmiſſible, and, therefore, could not be landed without a regular ſurvey of the brig, and a report of the neceſſity for landing; that they procured two maſters of ſhips to ſurvey the brig, one of whom declared that the cargo ought to be landed, and that their report was delivered to the collector.

The cauſe came on for hearing before the Vice-admiralty Court at *St. Croix*, when the Judge condemned the brig and the prohibited parts of the cargo; and from this ſentence of condemnatiom the preſent appeal was proſecuted.

JUDGMENT.

Sir *W. Scott*.—This *American* ſhip, with a cargo the property of *American* merchants, ſailed from *New York*, and arrived at the Iſland of *St. Croix*, where ſhe was ſeized and proceeded againſt for a breach of the navigation laws. The ſhip and part of the goods were condemned in the vice-admiralty court of that iſland, and from this ſentence of condemnation an appeal has been proſecuted before this Court.

An objection has been taken to the juriſdiction of the Court; and it has been contended, that under the terms

The TORTOLA.

December 5th, 1811.

terms of the capitulation by which the colony was surrendered to the *Britiſh* forces, the inhabitants are entitled to a hearing before His Majeſty's privy council. But it appears that this objection cannot be addreſſed to any ſerious conſideration of the Court, ſince the terms of the capitulation can only apply to the capitulants themſelves, the inhabitants of *St. Croix*, and cannot poſſibly be extended to theſe *Americans*; eſpecially when it is conſidered that they are in this caſe themſelves the appellants. I have no heſitation in overruling that objection.

The ſhip, it appears, arrived at *St. Croix*, having on board a mixed cargo, conſiſting partly of importable and partly of prohibited articles. The only ſhip's paper brought before the Court is the clearance from *New York*, which expreſſes a deſtination to *St. Croix*, without mentioning any intention of proceeding on an ulterior voyage to *St. Domingo* or elſewhere. Now, the preſumption of law certainly is, that the goods, under theſe circumſtances, were coming to the Iſland of *St. Croix* for importation; and this preſumption of law is confirmed and ſtrengthened by information upon oath; for the collector of His Majeſty's cuſtoms at *St. Croix* poſitively depoſes, that "the maſter attended "at the cuſtom-houſe with the clearance from *New* "*York* to *St. Croix*, and ſigned his manifeſt, for the "purpoſe, as he ſtated, of entering his cargo, but "*without reporting the ſame or any part thereof for* "*exportation.*" Here, then, is a preſumption of law fortified by a declaration upon oath, that it was the intention of the parties to effect an importation of theſe goods; for they aſſign no other intention reſpecting theſe goods. I do not ſay that this would be concluſive againſt the parties; but the preſumption of law thus

fortified

The TORTOLA.

December 5th, 1811.

fortified by at leaſt a negative declaration upon oath, requires, I think, to be rebutted by the ſtrongeſt poſſible evidence. Now, how ſtands the caſe upon the evidence which has been adduced on the part of the claimants? I muſt ſay, that the caſe appears to labour very much under a defect of the regular and proper evidence. The maſter, who is generally made acquainted with the real deſtination of the cargo, ought to have been produced as a witneſs; but, inſtead of him, the chief mate has been examined, who ſeldom knows any thing of the real and ultimate intention of the owners of the cargo; but whoſe principal duty it is to attend to the mere mechanical buſineſs of ſtowing the goods. The other witneſs who has been examined is the ſupercargo, and he is uſually ſuppoſed to be entruſted with the ſecrets of his employers; but, in the preſent caſe, the perſon filling this ſituation has not been ſo entruſted: he is left in a ſtate of perfect ignorance, and is directed, upon his arrival at *St. Croix*, to addreſs himſelf to a Mr. *M'Cormick*, and to conform to his directions in every reſpect. But neither has Mr. *M'Cormick*, who muſt be ſuppoſed to have a perfect knowledge of the tranſaction, been examined; ſo that, in addition to the defect of evidence on the part of the claimants, ariſing from the non-production of the maſter, the evidence of Mr. *M'Cormick* is alſo wanting. Neither the maſter nor Mr. *M'Cormick*, who are the only perſons capable of affording ſatisfactory information to the Court, have been produced as witneſſes; and this, I think, is a fatal and damnatory part of the caſe.

Let us ſee, however, what is ſtated by thoſe witneſſes who have been examined. *Joſeph Windſor*, the chief mate, depoſes, that "the veſſel was cleared from

"*New*

The TORTOLA.

December 5th, 1811.

" *New York* to *St. Croix*, that he underſtood ſhe was " bound to *Aux Cayes*; that the brig came into this " port for the purpoſe of cancelling a bond, and " obtaining a clearance for *Aux Cayes*; that the whole " cargo was intended to be landed here, but not with- " out a permit from the cuſtom-houſe; that the brig " was in a very leaky condition at the time of entering " this port, being obliged to keep one hand conſtantly " at the pump; that the leak is not yet diſcovered, " but that ſhe makes conſiderably leſs water at preſent, " it being now only neceſſary to pump her in the " morning and evening; that it was the poſitive inten- " tion of the parties, previous to their departure from " *New York*, and notwithſtanding the gale, to come " into this port." The ſame witneſs further ſtates, that, " to the beſt of his knowledge, the corn and " meal was intended for this place, and the remainder " of the cargo, he believes, for *St. Domingo*."—So that it was, undoubtedly, the intention of the parties from the firſt to enter the port of *St. Croix*; though, it is ſaid, with a deſign to re-export the prohibited goods.

Now the Court is unable to learn, at leaſt from any evidence in this cauſe, in what manner ſhips are reported in the *Weſt-India* Iſlands when there is an intention of re-exporting a part of the cargo. It appears, however, from an affidavit, in the caſe of the *Paiſley*, that when a veſſel arrives with a cargo, conſiſting partly of goods which are allowed by law to be imported, and partly of prohibited articles, it cannot be reported at the cuſtom-houſe without the expreſs permiſſion of the governor. How far the governors themſelves poſſeſs authority on this ſubject is a delicate queſtion, which the neceſſity of this caſe does not call

The TORTOLA.

December 5th, 1811.

upon me to diſcuſs. In this country, I know that ſhips are allowed, and even encouraged, to bring in cargoes of a mixed nature; but how far the colonial ports, to which the general policy of this country encourages or tolerates no trade, except for the conſumption and uſe of the iſlands, are under ſimilar regulations, is a very large queſtion, into which, as I have already ſtated, the circumſtances of this caſe do not require me to enter. It may be important, however, to ſee whether the maſter has complied with what is underſtood to be the uſual practice on ſuch occaſions. It does not, I think, appear that any permiſſion was obtained from the governor, *Hylton*. The ſupercargo ſays, upon his croſs-examination, "that he came on ſhore on "*Saturday* the fifth inſtant, and went immediately to "the government-houſe, the captain taking with him "the papers of the brig, (he does not ſay what papers,) "for the purpoſe of ſhowing them to the governor, if "required; that while the captain was with the "governor, he remained at the door of the govern-"ment houſe." Now it does not at all appear what paſſed between the maſter and the governor; nor, indeed, can it appear, ſince the witneſs remained at the door whilſt the interview between them took place; and the maſter, who is alone competent to ſpeak to the point, has not been examined. The fact, however, is, that no permiſſion to land the goods is proved to have been obtained. The witneſs goes on to ſtate, "that he went immediately from the government-"houſe to Mr. *M'Cormick*, for the purpoſe of ſeeing "him, but did not find him; that Mr. *M'Cormick* "arrived about one o'clock, and, after delivering the "letters, informed him, that it was too late this day "for the cuſtom-houſe, as it was then ſhutting up."

Here

The TORTOLA.

December 5th, 1811.

Here I have again to lament the want of proper information, and to regret, that the reaſons on which the judgment of the Court below were founded have not been tranſmitted. Many points of local information may have influenced the deciſion of the Judge of that court, with which I have not been inſtructed, and which are wholly out of the view of this Court. I deſire the commiſſioners of the cuſtoms may be informed, that it is matter of anxious expectation with the Court, that the grounds of the ſentences pronounced in the Vice-admiralty courts, and appealed to this Court, may in future be forwarded: the caſes of this kind are becoming very numerous, and are very important in their conſequences. It is ſtated, that the cuſtom-houſe was ſhut up at one o'clock: That this ſhould be a true repreſentation of the fact, appears to be highly improbable; but upon the truth or falſehood of the aſſertion it is impoſſible for this Court to decide. The witneſs *Hylton* further depoſes, " that he went to " the cuſtom-houſe on *Monday* morning, about nine " o'clock, accompanied by Mr. *M'Cormick* and Cap- " tain *M'Kie*; ſaw there a gentleman, whom, he has " ſince been informed, was a Mr. *M'Lean*, a nephew, " as he is likewiſe informed, of the collector *Dubois*. " Mr. *M'Cormick* gave him an unſigned manifeſt, " obſerving, at the ſame time, that the veſſel was in " a leaky ſituation, and requeſted permiſſion to land " the cargo for the purpoſe of repair. After looking " over the manifeſt, he replied, that ſome of the " articles would not be admitted to be landed; to " which the captain replied, that the cargo would be " in great danger, and would receive much damage " from the ſituation the veſſel was in. Mr. *M'Lean* " then replied, that a ſurvey muſt be held on the veſſel,

" and

" and that if it was found by the ſurveyors report " abſolutely neceſſary that the cargo muſt be landed " to enable the veſſel to be repaired, that a permit " would then be granted for the purpoſe. He further " aſked Mr. *M'Cormick* in what ſtores the cargo would " be put in, who replied, in any ſtores; and that he " would be ſecurity that the cargo ſhould be re-ſhipped. " they then left him for the purpoſe of having perſons " to ſurvey the veſſel. Captain *O'Zuill* and Captain " *Little*, with a maſter-carpenter, went immediately " on board the brig, when, after ſounding the pump, " they found ſhe leaked a great deal; they examined " the veſſel, but were not able to diſcover the leak. " The deponent declares, that he heard Captain " *O'Zuill* ſay, that it was abſolutely neceſſary the cargo " ſhould be diſcharged, in order to diſcover where " the leak was. That a report of ſurvey was drawn " up by Mr. *M'Cormick*, and ſigned by the two cap- " tains and carpenter; he, the deponent, ſaw the " report in the hands of Mr. *Dubois* before the ſeizure " took place." Now I cannot think it ſufficiently made out upon this evidence, that there was a neceſſity of landing the cargo in conſequence of the damage ſuſtained by the ſhip. Here has been no regular ſurvey; no appointment of ſurveyors by the cuſtom-houſe or the court of vice-admiralty, which is in the habit of granting commiſſions for that purpoſe. The ſurveyors were ſelected and appointed by the maſter himſelf; nobody knows who they were, or to what country they belonged; they might be maſters of foreign veſſels, who left the iſland before the cauſe came on for a hearing.

The principal circumſtances in evidence before the Court are theſe: that the ſhip arrived with a mixed

to come to *St. Croix*, in order to obtain a clearance from a port of that iſland. Could this be neceſſary for the purpoſe of obtaining admiſſion at *Aux Cayes?* Can I for a moment doubt that the ſhip and cargo would have been received at *Aux Cayes* without objection to the form of clearance? I am clearly of opinion, that this is a tranſaction void of all faith, and I ſhall, therefore, confirm the ſentence of the Court below, condemning the ſhip and the prohibited articles.

The TORTOLA.

December 5th, 1811.

SUCCESS, SMITH.

January 28th, 1812.

THIS was the caſe of a ſhip under the *Swediſh* flag and paſs, laden with a cargo of deals, tar, iron, and other articles; and captured whilſt in the proſecution of a voyage from *Gottenburgh* to *Malmo*. The cargo and a moiety of the ſhip appeared to be *Swediſh* property, and the other moiety to belong to *Britiſh* ſubjects. Claims were given on behalf of the reſpective owners, for the whole of the property, as protected by His Majeſty's inſtruction of the 20th of *June* 1810.

Ship employed in the coaſting trade of *Sweden*, and belonging in moieties to a *Swede* and two *Britiſh* ſubjects, not protected by inſtruction of 20th *June* 1810.

JUDGMENT.

Sir *W. Scott*.—This ſhip and cargo were taken on a voyage from *Gottenburgh* to *Malmo*, and are proceeded againſt for a breach of the Order in Council of the 7th of *January* 1807, by which the intercourſe between all ports from which *Britiſh* ſhips are excluded, is prohibited. On the part of the claimants, an exemption from the operation of this order has been ſet

The TORTOLA.

December 5th, 1811.

cargo, consisting in part of prohibited articles; that she had a clearance for *St. Croix*, and *St. Croix* only; that the master repaired to the governor, but for what purpose he did so does not appear; that he then went to the custom-house to enter the cargo, without declaring that he meant the same, or any part thereof, for re-exportation; that there was a partial and private survey of the ship by persons not regularly appointed. Such circumstances appear to lead to the conclusion that the presumption of law, as to the intention of importing these goods into *St. Croix*, is by no means ousted, but, on the contrary, is rather confirmed. There is a total failure of proof as to the integrity of the transaction, and it is sufficiently proved on the part of the seizor, that it was the intention of the laders of this cargo to dispose of it at *St. Croix*. Whether the case set up by the claimants would (supposing it to contain the true account) be sufficient to protect the ship and prohibited goods from confiscation, I very much doubt. What is the alledged purpose for which the ship was brought to *St. Croix?* Why, merely for the purpose of shifting her papers, and obtaining a fresh clearance, in order to trade with *St. Domingo*, a revolted colony of the enemy; to effect that through the medium of a *British* colony, which she was not permitted to do by the regulations of her own country. Is this a legitimate use of a *British* colonial port? I think not. It is not at all pretended, that they came for the purpose of supplying the necessities of the island; for, according to their own account, they were only to sell as much as was necessary for their *incidental expences*. There is another circumstance, which, in my opinion, radically affects the truth of the pretence set up by the claimants. It is said, that it was necessary

to

to come to *St. Croix*, in order to obtain a clearance from a port of that iſland. Could this be neceſſary for the purpoſe of obtaining admiſſion at *Aux Cayes?* Can I for a moment doubt that the ſhip and cargo would have been received at *Aux Cayes* without objection to the form of clearance? I am clearly of opinion, that this is a tranſaction void of all faith, and I ſhall, therefore, confirm the ſentence of the Court below, condemning the ſhip and the prohibited articles.

The TORTOLA.

December 5th, 1811.

SUCCESS, SMITH.

January 28th, 1812.

THIS was the caſe of a ſhip under the *Swediſh* flag and paſs, laden with a cargo of deals, tar, iron, and other articles; and captured whilſt in the proſecution of a voyage from *Gottenburgh* to *Malmo*. The cargo and a moiety of the ſhip appeared to be *Swediſh* property, and the other moiety to belong to *Britiſh* ſubjects. Claims were given on behalf of the reſpective owners, for the whole of the property, as protected by His Majeſty's inſtruction of the 20th of *June* 1810.

Ship employed in the coaſting trade of *Sweden*, and belonging in moieties to a *Swede* and two *Britiſh* ſubjects, not protected by inſtruction of 20th *June* 1810.

JUDGMENT.

Sir *W. Scott*.—This ſhip and cargo were taken on a voyage from *Gottenburgh* to *Malmo*, and are proceeded againſt for a breach of the Order in Council of the 7th of *January* 1807, by which the intercourſe between all ports from which *Britiſh* ſhips are excluded, is prohibited. On the part of the claimants, an exemption from the operation of this order has been ſet

The Success.

up under a later inſtruction of His Majeſty, relative to the coaſting trade of *Sweden*.

January 28th, 1812.

When the cauſe came on for hearing on a former day, ſome doubts were entertained reſpecting the national character of the perſons for whom this property is claimed; but an enquiry in the nature of further proof has been made, and it turns out that the cargo is entirely *Swediſh*, and that the ſhip belongs in moieties to a *Swede* and two *Britiſh* ſubjects. The evidence to that effect appears to be full and ſatisfactory, and indeed it is agreed on all ſides, that the real character of the parties is to be taken on the proof now before the Court. It appears, likewiſe, that the veſſel ſailed under the *Swediſh* flag and paſs, and that the maſter is a *Britiſh* ſubject, who has been admitted a burgher of *Kong-Elf* in *Sweden*, at which place, however, he has never reſided.

Such are the facts of the caſe; and the queſtion is, how far this ſhip thus owned and navigated is to be conſidered within the order of the 20th of *June* 1810, paſſed for the purpoſe of protecting *Swediſh* veſſels carrying on the coaſting trade of *Sweden*. Now it is a known rule of law, that when parties agree to take the flag and paſs of another country, they are not permitted, in caſe any inconvenience ſhould afterwards ariſe, to aver againſt the flag and paſs to which they have attached themſelves, and to claim the benefit of their real character. They are likewiſe ſubject to this further inconvenience, that their own real character may be pleaded againſt them by others. Such is the ſtate of double diſadvantage to which perſons expoſe themſelves by aſſuming the flag and paſs of a foreign ſtate.

The

The Success.

January 28th, 1812.

The point on which the captors rely for condemnation in the preſent caſe is, the legal incapacity of the claimants in their real character to carry on the trade in which they had engaged. What was the relative ſituation of *Britiſh* and *Swediſh* ſubjects at the time when this capture took place? *Sweden* had iſſued a declaration of war againſt this country, but that had not been echoed by any counter-declaration on the part of *Great Britain*; neither had the *Britiſh* Government cauſed any notification to be made to its own ſubjects reſpecting the fact of the *Swediſh* proclamation. It might, perhaps, be a queſtion of ſome nicety, to determine how far this unilateral declaration, not acted upon or even notified to them by the government of their own country, would affect the right of *Britiſh* ſubjects to carry on their accuſtomed intercourſe with the ports of *Sweden*. But it is not neceſſary for the Court, in order to decide upon the validity of the preſent claim, to ſay what would be the effect of this ſtate of things; for the queſtion, I think, may be conſidered as reſting upon other grounds. The relative ſituation of *Britiſh* ſubjects to *Sweden* muſt depend upon the Order in Council, by which not only the countries with which we are actually at war, but thoſe alſo from which the *Britiſh* flag is excluded, are placed in a ſtate of blockade. The blockade which has thus been impoſed is certainly of a new and extended kind; but has ariſen neceſſarily out of the extraordinary decrees iſſued by the ruler of *France* againſt the commerce of this country, and ſubſiſts, therefore, in the apprehenſion of the Court at leaſt, in perfect juſtice. What then is the ſituation in which *Britiſh* ſubjects are placed by theſe retaliatory meaſures which have been reſorted to as a defence againſt the injuſtice and vio-

The Success.

January 28th, 1812.

lence of the enemy? Is it competent to them to trade at the ports thus placed under blockade, provided they can by any means elude the vigilance of the government of that country in which the ports happen to be ſituated? I am of opinion that they cannot. The meaſure which has been reſorted to, being in the nature of a blockade, muſt operate to the entire excluſion of *Britiſh* as well as of neutral ſhips; for it would be a groſs violation of neutral rights, to prohibit their trade, and to permit the ſubjects of this country to carry on an unreſtricted commerce at the very ſame ports from which neutrals are excluded. It would be a ſhameful abuſe of a belligerent right, thus to convert the blockade into a mere inſtrument of commercial monopoly; and for this reaſon *Britiſh* ſubjects have not been permitted, except under ſpecial licence, to have acceſs to thoſe ports which lie under an interdiction as to general trade. Such licences have been occaſionally iſſued in caſes of regular and ordinary blockades, and may perhaps have been granted with greater liberality under that impoſed by the Order in Council, which is of a peculiar character, and neceſſarily requires a greater degree of modification. But in no caſe has an intercourſe with blockaded ports been allowed, except a licence has been firſt ſpecially granted for that purpoſe. It has been deſcribed as a ſtrange and abſurd proceeding, to deprive *Britiſh* ſubjects of the power to trade with theſe interdicted ports, when the very effect intended to be produced by the Order in Council was, to compel the admiſſion of *Britiſh* merchandize. The object of the Government in impoſing the blockade has been truly repreſented; but that object muſt be attained through the general privations occaſioned to the enemy, not by the encouragement of the trade of your

The Success.

January 28th, 1812.

your own ſubjects to the excluſion of neutral trade: a contrary mode of proceeding might, perhaps, be attended with advantage, but it would not be a legitimate advantage, ſince it is inconſiſtent with the rights of other countries. Theſe conſiderations, it appears to me, diſpoſe of the caſe as far as *Britiſh* intereſts are concerned.

The queſtion then remains as to the other moiety of the ſhip, which has been claimed for a *Swediſh* ſubject, and which is now admitted, by the counſel for the captors, to belong as claimed. It has been contended, that this part of the property is entitled to protection under His Majeſty's inſtruction, permitting the coaſting trade of *Sweden* to be carried on by *Swediſh* ſhips. Many orders of a pacific tendency towards *Sweden*, particularly this of the 20th of *June* 1810, have been iſſued with a view of taking off, in ſome degree, the weight which would otherwiſe preſs very heavily on the commerce of that kingdom. The ſame indulgence, however, has not been vouchſafed to the navigation of other countries, and this Court has no power of extending it beyond the terms of the order by which it is granted. Is this then to be conſidered, either legally or grammatically, as a *Swediſh* ſhip? Grammatically it certainly is not:—the Court has already pronounced it to be half *Britiſh*. Nor do I think that it is legally to be conſidered a *Swediſh* ſhip, ſince the *Swediſh* flag and paſs under which it was ſailing do not deſcribe, but, on the contrary, diſguiſe, its real character. A *Swediſh* ſhip muſt be *Swediſh in toto*, without any intermixture of other intereſts. In this caſe, a fraction only of the ſhip is *Swediſh*, and I do not know that a moiety has a peculiar privilege over any other fraction. Conſider what would be the effect if a mere *Swediſh*

The Success.

January 28th, 1812.

portion, however ſmall, were ſufficient for the purpoſe of protection from *Britiſh* capture; the navigation of the whole world would then be let in to the advantages of this trade, which it was the expreſs intention of the Orders in Council to prohibit. It would only be neceſſary to get a *Swede* as part-owner, and then an *American*, or any other neutral, would be at liberty to engage in this courſe of trade, and the blockade would be entirely at an end. I am of opinion, that only ſuch ſhips as are entirely *Swediſh* are entitled to the favourable operation of the inſtruction iſſued in *June* 1810, and I am therefore under the neceſſity of pronouncing the condemnation of the entire ſhip and cargo.

VIXEN, HUTCHINGS.

February 18th, 1812.

Navigation laws, breach of, by illegal importation of *Eaſt India* goods into *Barbadoes*—aſſerted intention of carrying them on to *St. Thomas*—not proved.—Governors of *Weſt India* iſlands have no authority to permit importation of prohibited goods—caſe of fraud—condemnation.

THIS veſſel, under *American* colours, ſailed from *Baltimore* on the 13th *September* 1806, and from *Norfolk* in *Virginia*, on the 26th of the ſame month, with an aſſorted cargo, conſiſting of flour, *Eaſt India* goods, and other merchandize, together with ſixty-four boxes of ſpecie, bound to *Barbadoes*, and arrived at *Carliſle Bay* in that iſland on the 16th *October*; when the ſpecie and cargo, ſave the *Eaſt India* goods, *viz.* twenty cheſts of tea, one package of *Madras* handkerchiefs, and forty bundles of nankeen, were landed, and the ſaid *Eaſt India* goods remaining on board, were, on the 1ſt *November*, entered and cleared as merchandize for the Iſland of *St. Thomas*. On the 3d *November* 1806, the ſhip and goods were ſeized by

Thomas

The VIXEN. February 18th, 1810.

Thomas Rochford comptroller, and *Thomas Spencer* waiter and ſearcher of His Majeſty's cuſtoms for the port of *Bridgetown*, as a forfeiture, and proceeded againſt in the Vice-Admiralty Court of *Barbadoes*.

An information was filed on behalf of the ſeizors, which pleaded, amongſt other things, as follows, *viz.* That notwithſtanding a certain act made and paſſed in the twelfth year of the reign of His late Majeſty King *Charles* the Second, intituled "An act for the encou- "raging and increaſing of ſhipping and navigation;" alſo one other act made and paſſed in the fourteenth year of the reign of His ſaid Majeſty King *Charles* the Second, intituled, "An act for preventing frauds and "regulating abuſes in His Majeſty's cuſtoms;" alſo one other act or ſtatute made and paſſed in the fifteenth year of the reign of His ſaid Majeſty King *Charles* the Second, intituled "An act for the encouragement of "trade;" alſo one other act or ſtatute made and paſſed in the ſeventh and eighth years of the reign of His late Majeſty King *William* the Third, intituled "An act for preventing fraud and regulating abuſes "in the plantation trade;" alſo one other act made and paſſed in the ſeventh year of the reign of His late Majeſty King *George* the Firſt, intituled "An act for "the further preventing His Majeſty's ſubjects trading "to the *Eaſt Indies* under foreign commiſſions, and "for encouraging and further ſecuring the lawful "trade thereto, and for the further regulating the "pilots of *Dover*, *Deal*, and the *Iſle of Thanet*;" alſo one other act made and paſſed in the fourth year of the reign of His preſent Majeſty, intituled "An "act for granting certain duties in the *Britiſh* colonies "and plantations in *America*, for continuing, amend-

The VIXEN.

February 18th, 1812.

" ing, and making perpetual an act paſſed in the ſixth " year of the reign of His late Majeſty King *George* " the Second, intituled 'An act for the better' " ſecuring and encouraging the trade of His Majeſty's " ſugar colonies in *America*,' for applying the produce " of ſuch duties, and the duties to ariſe by virtue of " the ſaid act, towards defraying the expences of " defending, protecting, and ſecuring the ſaid colo- " nies and plantations; for explaining an act made in " the twenty-fifth year of the reign of King *Charles* " the Second, intituled An act for the encouragement " of the *Greenland* and *Eaſtland* traders, and for the " better ſecuring the plantation trade, and for altering " and diſallowing ſeveral drawbacks on exports from " this kingdom, and more effectually preventing the " clandeſtine conveyance of goods to and from the " ſaid plantations, and improving and ſecuring the " trade between the ſame and *Great Britain*;" alſo one other act, made in the twenty-ſeventh year of the reign of His preſent Majeſty, intituled " An act for " allowing the importation and exportation of certain " goods, wares, and merchandizes, in the ports of " *Kingston*, *Savanna la Mar*, *Montego Bay*, and *Santa* " *Lucca*, in the Iſland of *Grenada*, in the port of " *Roſſeau*, in the Iſland of *Dominica*, and in the port " of *Naſſau*, in the Iſland of *New Providence*, one of " the *Bahama* Iſlands, under certain regulations and " reſtrictions;" alſo one other act, made in the forty-fifth year of the reign of His preſent Majeſty, intituled " An act to conſolidate and extend the ſeveral laws " now in force, for allowing the importation and " exportation of certain goods and merchandize into " and from certain ports in the *Weſt Indies*;" and, notwithſtanding certain other acts and ſtatutes in this behalf

The VIXEN.

February 18th, 1812.

behalf made and provided, certain goods and commodities of the produce or manufacture of the *Eaſt Indies*; to wit, twenty cheſts of tea, one package containing ten bundles of *India* or *Madras* handkerchiefs, forty packages or bundles of *India* nankeen, containing about four thouſand pieces; and ſixty-four boxes, containing coin, were imported and brought into the port of *Bridgetown*, in this iſland, being a *Weſt India* iſland belonging to His Majeſty, in a certain ſchooner or veſſel called the *Vixen*, from a port in the United States, the ſame being a foreign port, the ſaid *Eaſt India* goods and coin not having been laden on board the *Vixen* at any port of the United Kingdom, or any of the colonies, plantations, or territories, belonging to the Crown of *Great Britain*; and the ſaid ſchooner or veſſel not being owned by *Britiſh* ſubjects, or navigated according to law; and the informants having notice of the illegal actings and doings aforeſaid, did, on or about the 3d of *November* 1806, at the port of *Bridgetown* aforeſaid, ſeize, as forfeited, the ſaid ſchooner or veſſel, with the boats, tackle, apparel, and furniture, together with the cargo on board her, which ſaid cargo, together with the ſaid ſchooner, ought to be forfeited and confiſcated, according to the acts and ſtatutes aforeſaid, or ſome or one of them in ſuch caſe made and provided, one-third part thereof to the uſe of our ſaid Lord the King, one-third part thereof to his Honour *John Spooner* Eſq. Preſident and Commander in Chief, as aforeſaid, and the other third part thereof to the informer, and prayed that the ſame might be forfeited and confiſcated accordingly.

A claim was given by the maſter for the veſſel and the goods on board her at the time of the ſeizure, as the

The VIXEN.

February 18th, 1812.

the property of *Gabriel Wood* Eſq. deſcribed a ſubject of His Majeſty, and late His Majeſty's Vice Conſul for *Maryland*, reſiding at *Baltimore*, and there carrying on trade, being entitled to the privileges of a citizen of the United States.

The claimant, in the atteſtation in ſupport of his claim, depoſed, that the ſaid veſſel was laden at *Baltimore*, and *Norfolk*, in *Virginia*, with an aſſorted cargo of flour and other merchandize, and ſome ſpecie, in the month of *September* laſt paſt, with which ſhe took her departure from *Baltimore* aforeſaid, on the 13th of that month; and from *Norfolk* on the 26th of the ſame month, bound for *Barbadoes*, and arrived in *Carliſle Bay* upon the 16th day of *October* laſt. That on the 17th day of ſame month the veſſel was regularly entered, and a manifeſt of the cargo of merchandize and ſpecie on board her was delivered into the cuſtom-houſe for the port of *Bridgetown* and the ſeveral offices of the iſland. That permiſſion was duly obtained from his honour the preſident, as alſo from the proper officers of the cuſtoms, for landing ſome part of the cargo; and ſuch part thereof for which permiſſion was obtained, and which was mentioned to be imported in this iſland, having been diſcharged and landed on or before the 1ſt of *November* laſt paſt, the ſchooner duly obtained a clearance and licence to authorize her departure for the Iſland of *St. Thomas*, which was regularly ſigned, as well by *Hew Dalrymple* Eſq. His Majeſty's collector for the port of *Bridgetown*, as by the ſaid *Thomas Rochford* and *Thomas Spencer*, or ſuch other officers and perſons in the cuſtom-houſe as are authorized and accuſtomed to ſign clearances; the ſaid veſſel, at the time

The VIXEN.

February 18th, 1814.

time of ſuch clearance, as well as all the time ſhe was at anchor in *Carliſle Bay*, having on board and intending to carry away the ſaid merchandize, conſiſting of *Eaſt India* goods. That the articles of merchandize mentioned in the manifeſt and clearance of the ſaid veſſel, upon her entry and clearance aforeſaid, conſiſted of twenty cheſts of tea, one package of *Madras* handkerchiefs, and forty bundles of nankeens; and that the ſame were entered for exportation under the head of forty bundles of merchandize, one bale ditto, and twenty ſmall boxes ditto, and were never (unleſs the ſame could have been legally effected) meant or intended to be imported into, or landed at *Barbadoes*; but were intended to be carried away in the ſaid veſſel: the claimant therefore inſiſted, that there was no importation whatever of all or any of the articles of merchandize ſo entered as aforeſaid, within the ſpirit, true intent, and meaning of all, any, or either of the ſaid recited acts or ſtatutes, or of any other act or ſtatute whatever, and that there was not any intention whatever to defraud His Majeſty's revenue. That on the day of the arrival of the ſchooner in *Carliſle Bay*, to wit, on the ſaid 16th of *October* laſt paſt, permiſſion was applied for, and duly obtained, under the ſignature of his Honour Preſident *Spooner*, and the ſaid *Hew Dalrymple* Eſq. collector for the port of *Bridgetown*, as he had been informed and believed, to land ſixty-four boxes of ſpecie, which he had alſo been informed and believed were procured in purſuance of a contract entered into with the Commander in Chief of His Majeſty's forces in the *Weſt Indies*, for the accommodation and ſupply of His Majeſty's ſaid forces; and the ſaid ſpecie was, by virtue of ſuch permiſſion, landed accordingly. That the ſaid ſpecie did not form or comprize

The VIXEN.

February 18th, 1812.

comprize any part of the cargo on board the ſaid ſchooner at the time of the ſeizure, the ſame having been landed on the 16th of *October*. That the ſaid ſixty-four boxes of ſpecie were landed by the expreſs authority of His Majeſty's repreſentative in the iſland, obtained for that purpoſe, as well as by the permiſſion of the ſaid collector of His Majeſty's cuſtoms for the port of *Bridgetown*, and were for the actual ſupply of His Majeſty's forces, and were not imported in contravention of any or either of the acts or ſtatutes mentioned in the information. That the officers of His Majeſty's cuſtoms, previous to the ſaid veſſel's having obtained her clearance, well knew and underſtood that the articles of merchandize mentioned in the manifeſt and clearance conſiſted of the aforeſaid articles. That as all the tranſactions relative to the ſaid ſchooner had been open, fair, and *bonâ fide*, and no fraud or colluſion whatever intended or practiſed by him, or by any perſon or perſons intereſted or concerned, and as no breach of any or either of the ſaid acts or ſtatutes had been committed, or ever intended to be committed, he ſubmitted to the judgment of the Court, whether the ſaid veſſel and cargo ought to be forfeited and confiſcated, as prayed by the informants in the information.

The Judge of the Vice-Admiralty Court at *Barbadoes* rejected this claim, and condemned the veſſel and the cargo as ſpecified in the information. From this ſentence an appeal was proſecuted before this Court.

JUDGMENT.

Sir *W. Scott*.—This is an appeal from a ſentence of the Vice-Admiralty Court at *Barbadoes*, by which the

The VIXEN.

February 18th, 1812.

ſhip itſelf and the goods which were found on board it at the time of ſeizure, have been pronounced ſubject to condemnation. It appears that another part of the cargo, conſiſting of ſome gold and ſilver coin, had been previouſly landed, with the permiſſion of the governor, for the payment of His Majeſty's forces compoſing the garriſon of the iſland. There ſeems alſo reaſon to ſuſpect that an additional quantity of ſpecie had been put on ſhore for a different purpoſe, and without the permiſſion of the governor, fairly obtained. However that may have been, no ſeizure was made of the coin which is ſaid to have been thus improperly landed, nor does it appear to have been at all an object of the proceedings in the Court below. The fact was not there in iſſue between the parties, ſo as to put the claimant on his defence, and to give him an opportunity of explaining the ſuſpicious appearances with which the tranſaction was attended. I ſhall therefore diſcharge this circumſtance entirely out of my conſideration, and not ſuffer it to have any influence, either directly or indirectly, upon the judgment of the Court. The proceedings in this place, as they were in the Court below, are confined to the ſhip itſelf, and to the goods which were remaining on board at the time when the ſeizure was effected. Theſe turn out to be *Eaſt India* goods, conſiſting of twenty cheſts of tea, one package of *Madras* handkerchiefs, and forty bundles of nankeen; and it is on account of the illegal importation of theſe goods, that the articles themſelves and the veſſel have incurred the penalty of confiſcation.

It has been aſſerted, on the part of the claimant, that theſe *Eaſt India* goods were brought to the iſland with an intention of carrying them on to *St. Thomas*'s, and

The VIXEN.

February 18th, 1812.

and that they were actually entered at the cuſtom-houſe for re-exportation, at the time when the ſeizure was made. The Court has, upon this alleged ſtate of facts, been called upon to declare its opinion upon a very important point of law, which has not hitherto been decided by the authority of a ſuperior Court, namely, whether it be lawful for *Americans*, or any other foreigners, to bring prohibited goods into a *Britiſh* colony, with an intention of re-exporting them. But in order fairly to raiſe a caſe of this kind, it is hardly neceſſary to obſerve, that there muſt be an abſence of all fraud, and a clear proof of an intention to re-export the prohibited articles. In the preſent caſe, however, it is admitted, that there was a qualified intention to import the goods, and that an application was actually made to the governor for his permiſſion to land them, though a fair and ingenuous diſcloſure as to their qualities was withheld. So that not only is there want of proof, applying to a clear intention of re-exporting the goods, but there is even an avowed purpoſe to import them, provided the permiſſion of the governor could be obtained. The Court, therefore, is not placed under any neceſſity of giving its opinion on the abſtract queſtion of law; at leaſt there is another previous queſtion to be determined, how far the act done with an intention to import, if permiſſion could be obtained for that purpoſe, is to be conſidered a lawful act. Now, it ſo happens, that *Eaſt India* goods are ſubject to a double prohibition. The importation of them into the *Britiſh* colonies is not only forbidden by our navigation and colonial laws, but is in direct oppoſition likewiſe to the guarded rights and privileges of the *Eaſt India* Company. The proviſions of the ſtatute by which the ſtrictneſs of the colonial

The VIXEN.

February 18th, 1812.

colonial ſyſtem has been ſomewhat relaxed, are limited and ſpecial. A diſcretionary power is veſted in the Crown to authorize a relaxation with reſpect to the importation of ſome particular articles, and this power is to be exerciſed by an Order in Council, tranſmitted to the Governors of the *Weſt India* Iſlands, for their guidance and direction. But the governors themſelves are intruſted with no ſuch diſcretionary power: they muſt look to the text-law only as contained in the order iſſued by His Majeſty, and are not at liberty to act upon their own ſenſe of expediency and propriety. I cannot help obſerving, that the ſame miſtake has prevailed in this, as in a former caſe, (the *Adams, Tubbs*,) reſpecting the extent of a governor's authority to permit the importation of prohibited goods into the colonies over which he is appointed to preſide. It muſt be underſtood that, unleſs the goods are enumerated in the Order in Council iſſued for that purpoſe, the permiſſion of the governor is null and of no effect; and that it is as penal to import non-enumerated goods under his authority as without it. Such a proceeding muſt be placed on the ſame ſhelf as an attempt to import the goods without any permiſſion whatever; for a permiſſion which is in itſelf null and void, is in fact no permiſſion at all. Neither can the claimant ſhelter himſelf under an aſſerted ignorance with reſpect to the extent of power veſted by law in the governor. Parties coming to trade in any country are bound to know the laws of that country; nor can they be permitted to plead ignorance of one part of the law more than of another.

Edwards, 289.

If the caſe reſted here, I am clearly of opinion, there would be ſufficient cauſe of condemnation: but this is putting it on much too narrow a ground; for looking to the circumſtances of the caſe and

The VIXEN.

February 18th, 1812.

conduct of the parties, I must say, that, in my apprehension, they sufficiently disclose a sinister purpose. I can by no means admit the justice of the representation made by the counsel, that there was an absence of all attempt to deceive the government, and to evade the laws of the country. For what would have been the conduct of the parties on such a supposition? There must necessarily, in that case, have been a full and candid disclosure respecting the quality of the goods, and an avowal from the first of an ulterior destination to *St. Thomas*. But the fact of a destination to that island is not mentioned in any of the ship's papers; it is not averred in the claim, nor is it spoken to by the master upon his examination. In his answer to the interrogatories which have been addressed to him, he states, simply, that the vessel was bound for *Barbadoes*, and the asserted intention of proceeding to *St. Thomas* only comes out when the application to the governor for permission to land these goods had proved unsuccessful, and when it became necessary to fix upon some place of destination in order to obtain a clearance. It must be observed also, that the ship had passed the Island of *St. Thomas* in the course of her voyage to *Barbadoes*, which fact is hardly consistent with an original intention of importing the goods into the former island. Then how are the goods characterized? In the petition which was presented to the governor, for the purpose of obtaining permission to land them, they are not represented as *East India* goods, but are described under the general name of *merchandize*. The master also, as it appears to me, has been guilty of putting a false face upon things. He has sworn that the entry made at the custom-house contained "a just "report of the ship, and a true account of the lading, "with

The VIXEN.

February 18th, 1812.

" with the particular marks, number, quantity, *qua-*
" *lity*, and property, of all the goods and merchan-
" dizes in the ſaid ſhip, to the beſt of his knowledge
" and belief." Now is there any ſpecification of theſe particulars contained in the entry? Quite the contrary. No part of the cargo is entered as conſiſting of *Eaſt India* goods, which are known to be univerſally prohibited; but theſe goods are ſtill deſcribed under the general name of *merchandize*, of which ſome articles are, by law, admiſſible, and others prohibited. The maſter himſelf profeſſes a perfect ignorance as to the fact of there being any *Eaſt India* goods on board. He ſays, " that forty bundles, one bale, and twenty
" packages were put on board the ſaid ſchooner at the
" port of *Baltimore*, in the United States of *America*,
" ſome time in the month of *Auguſt* or *September* laſt
" paſt; but the contents of the ſame being entered as
" merchandize generally, this deponent cannot ſet
" forth whether the ſame were *Eaſt India* goods or
" not." He further ſays, that " he cannot ſet forth
" whether the perſon to whom the ſaid goods were
" conſigned had any intention of landing them;"
though, in another part of his evidence, he admits,
" that he has heard permiſſion was prayed his Honour
" the Governor, that leave ſhould be granted to land
" the articles of merchandize, which permiſſion he
" has heard was not granted." The converſation which took place between the maſter and Mr. *Killikelly*, a ſearcher in the port of *Kingston*, furniſhes another ground of ſuſpicion. The maſter ſays, " that he him-
" ſelf cleared out the ſaid ſchooner at the cuſtom-houſe,
" *Bridgetown*; that a gentleman of the cuſtoms,
" whoſe name deponent does not recollect, aſked him
" concerning a cheſt of tea on board the ſaid ſchooner,

The VIXEN.

February 18th, 1812.

" but deponent does not recollect that the ſaid gentle-
" man queſtioned him at all concerning *Eaſt India*
" goods which might have been on board, nor did
" deponent ſay any thing of any kind of *Eaſt India*
" goods whatſoever on board the ſaid ſchooner." Mr. *Killikelly* has likewiſe been examined upon this point, and he gives a very different account of what paſſed between the maſter and himſelf. He ſays, " that he enquired particularly of the ſaid *Samuel Hut-*
" *chings*, whether he had not any more tea or any
" *Eaſt India* goods on board; to which he anſwered,
" that he had only brought that quarter-cheſt of tea
" for private uſe, and that he had not another ounce
" of tea on board, nor did he know of any *Eaſt India*
" goods being on board the ſaid ſchooner." Now how could the maſter take upon himſelf to make this aſſertion, which is quite inconſiſtent with his averred ignorance of the contents of theſe packages. In his communication with this gentleman he aſſerts poſitively, and without reſerve, that he had not an ounce of tea nor any *Eaſt India* goods on board, and it turns out that he had twenty cheſts of tea and a large quantity of *Eaſt India* goods. Here is likewiſe another converſation, which it is difficult to reconcile with good faith in the parties; I allude to what paſſed between Mr. *Cavan*, the conſignee of the cargo, and Mr. *Dalrymple*, the collector of the cuſtoms. *Dalrymple* ſays, that " Mr. *Cavan* followed him out of
" the cuſtom-houſe, and forced a converſation upon
" him as a private gentleman and a man of honour." One does not very well underſtand how a perſon in an official ſituation can be conſidered to act as a gentleman and a man of honour in ſuffering himſelf to be made the depoſitory of private ſecrets, that might concern

The VIXEN.

February 18th, 1812.

cern the execution of his public duty. He goes on to ſay, "Mr. *Cavan* informed him, that the goods on board "the *Vixen*, under the name of merchandize, were *Eaſt* "*India* goods, and that he meant to petition the go- "vernor to allow the landing the ſame; the deponent "ſaid, (and very properly,) that if his Honour did grant "the petition, deponent was bound, by his orders, "to oppoſe their being landed." *Dalrymple* further ſtates, "that he was no otherwiſe apprized of theſe "being *Eaſt India* goods on board than from the "information given him by Mr. *Cavan*, in the con- "verſation that paſſed between him and the deponent "previous to his clearing the ſchooner for *St. Thomas*, "and which converſation the deponent had reaſon to "doubt, as the declaration on oath of the maſter was "much more to be depended upon than the private "word of Mr. *Cavan*; that the deponent did ſign a "permit for landing the goods as granted by the pre- "ſident, for which he received the uſual fee as paid "by Mr. *Cavan* on permits; that by the captain's "oath, on clearance, the ground of ſeizure did not "exiſt, he having ſworn that he had on board twenty "boxes, one bale, and forty bundles, of merchan- "dize; that by the word of Mr. *Cavan* deponent had "reaſon to believe ſuch ground of ſeizure did exiſt, "but, as he has previouſly ſtated, the oath of the "captain did away with the word of Mr. *Cavan*." Now here again it is not eaſily to be underſtood how the cuſtom-houſe officer arrived at this concluſion. The maſter had ſworn that he had theſe packages on board, deſcribing the contents of them as merchandize generally, without making any ſpecific ſtatement of the quality of the goods, and Mr. *Cavan* had expreſsly ſtated that they conſiſted of *Eaſt India* goods. I pro-

The Vixen.

February 18th, 1812.

fess that I am quite at a loss to know how Mr. *Dalrymple* could have considered this oath of the master as opposed to the declaration of Mr. *Cavan*. But supposing the conduct of the custom-house officer to have been indulgent towards the parties, that will not alter the nature of the case, or entitle them to any relief from the penalties inflicted by the statute. *De Wolfe*, the person who carried up the petition for the permit, says, "that he gave the said petition or paper "to Mr. *Walroud*, the secretary to his Honour the "President, who did present the same to his Honour "the President for his perusal, saith, that in a short "time Mr. *Walroud* returned to deponent, and in-"quired particularly what those articles were which "were in the petition so presented for his Honour's "perusal stated to be merchandize; deponent answered, "that he could not tell; that some further conversa-"tion then took place between him the deponent, "and Mr. *Walroud*, but what may have been the "particular words thereof he cannot positively affirm; "that he believes he might have said to Mr. *Walroud*, "that such merchandize consisted of kickshaws, or "trifles for the ladies, though he does not positively "recollect." The petition, it appears, was again presented; but the witness says, "the President would "not allow the landing of the said merchandize, "because he had reason to believe that it consisted of "*East India* goods, which, if permitted to be landed, "would injure the *British* mercantile interest." Now how can it be said that the conduct of the parties in this, or indeed in any part of the transaction, has been open and ingenuous? The fact of there being *East India* goods on board has been disguised as far as it was possible to disguise it, and an attempt has been made

The VIXEN.

February 18th, 1812.

made to practiſe an impoſition on thoſe who had a right to require a full and true diſcloſure of every particular. At laſt, the petition being rejected, a clearance is applied for and obtained, and hence it has been argued that the offence was purged. But a change of purpoſe, ſuppoſing the ſincerity of the change to be clearly eſtabliſhed, would not relieve from the penalties of the law, ſince the offence had been already conſummated by bringing the goods within the harbour with the intention of importing them under a permiſſion, which could not in any way have legalized their importation. The ſincerity of the change of purpoſe, however, is rendered ſomewhat doubtful by the ſubſequent conduct of the parties. The veſſel had already lingered three days ſince the clearance was obtained, and, it ſhould ſeem, would have lingered a fourth, Mr. *Cavan* himſelf admitting that the ſhip was not to have ſailed on the day the ſeizure was effected. There is another fact in the caſe by no means calculated to remove the impreſſion which has been made upon the mind of the Court. The removal of the goods from that part of the ſhip in which they had been originally ſtowed, is a circumſtance productive of ſuſpicion, upon which no ſatisfactory explanation has been given. I am of opinion that the ſentence of the Court below muſt be affirmed with coſts againſt the appellants.

April 28th, 1812.

BEAVER, JONES.

A *Britiſh* built ſhip transferred to foreigners, but remaining oſtenſibly *Britiſh*, is liable to condemnation for importing goods into a *Britiſh* colony, and the cargo, though belonging to different perſons, and ſhipped under a perfect ignorance of the transfer, muſt ſhare the ſame fate.

THIS ſhip, under *Britiſh* colours, was ſeized in the port of *Quebec*, and together with her cargo proceeded againſt for a breach of the navigation laws *. The alleged ground of forfeiture was an illegal importation of goods into a *Britiſh* colony on board a foreign ſhip; the libel charging that this veſſel did not belong *bonâ fide* to the *Britiſh* merchant by whom ſhe was claimed, but to ſome *American* citizens to whom ſhe had been transferred before the commencement of the preſent voyage.

JUDGMENT.

Sir *W. Scott*.—This is a queſtion ariſing upon a revenue proceeding, founded upon the illegal importation of articles in a foreign ſhip into a *Britiſh* colony. The libel contains, in one count, a general plea that the ſhip was foreign owned; and the other counts ſtate *formâ et modo* the transfer from the *Britiſh* to the *American* owner.

It has been contended in argument, that it is neceſſary to prove *the whole* of this information; but I am of opinion that it will be ſufficient if the fact pleaded *in the general count only* be eſtabliſhed in proof. It has been ſaid, too, that, in this caſe, as in a criminal proceeding, it is incumbent on the proſecutor to prove the truth of his charge; but the aſſertion is not correct, for the law has provided that, in caſes of revenue proceedings, the *onus probandi* is to lie on the claimant, and not on the ſeizor; and this does, I think, make a ſubſtantial difference between criminal and revenue proceedings. At all events, and taking it without reference to that poſitive rule, it muſt be admitted that nothing

* 12 Car. 2. c. 18.
4 G. 3. c. 15.
26 G. 3. c. 60.
28 G. 3. c. 6.

4 G. 3 c. 15. ſ. 45.

The BEAVER.

April 28th, 1812.

nothing more can be required of the public profecutor than that he ſhould make out a *primâ facie* caſe, and then the burthen of proof is thrown on the other party.

It is clear that there exiſted in *Shaw*, the *Britiſh* owner at *Quebec*, an intention to ſell, and in *Robinſon* and *Hartſhorne* of *New York* to purchaſe this ſhip, and that they purpoſed the ſale ſhould take place at *Quebec*. It appears that a notary was employed to draw a bill of ſale, and that application was made to the cuſtom-houſe officer reſpecting the regiſter, but finding the transfer could not legally take place there in the manner in which it was intended, the affair was abandoned; but it was abandoned *in form only*: the intention of purchaſe and ſale continued, and the ſubſtance of the contract was actually carried into effect at *Quebec*, for the payment was there made, and the entire management of the ſhip was there transferred to *Robinſon* and *Hartſhorne*, who appoint the maſter and give directions for the voyage. The maſter, too, ſails with a full impreſſion that the veſſel was to be delivered up to the purchaſers at *New York*.

It is ſaid, that Mr. *Shaw* of *Quebec* has claimed the ſhip as his own property, and it is true that he has done ſo, but he has made no affidavit in ſupport of his claim. Nor can this omiſſion have ariſen from mere inadvertence on his part, for the circumſtance is brought to his obſervation at the time, in the replication of the ſeizors, where the want of an affidavit is noticed, and an objection is taken on that account to the admiſſibility of the claim.

The Court having got ſo far as to find that there was a contract, payment, and delivery, has a right to call upon the parties to ſhew, in the cleareſt manner, that

The BEAVER.

April 28th, 1812.

that there was not a complete transfer of the property. It has a better right to do ſo, ſince the cauſe was originally tried where Mr. *Shaw* himſelf was reſident, and muſt have known to what point the attention of the Court was directed. If the intended contract had gone off altogether, there muſt have been ſome correſpondence between him and *Robinſon* and *Hartſhorne* with reſpect to the diſappointment; and, if he acquieſced in this, there muſt have been a further correſpondence reſpecting the account of freight and the outfit and employment of the veſſel. Now there is no ſuch correſpondence, there were no ſuch accounts paſſing between them, nor, as far as it appears, any communication whatever. Out of tenderneſs to the cargo, which may be affected by the character of the ſhip, the Court felt a diſpoſition not to ſhut out any further proof which the parties might have been able to adduce in ſupport of their claim; but I am now told that no further evidence will be offered, and this I think deciſive of the point that the ſhip, though oſtenſibly *Britiſh*, is in reality *American* property. As the Navigation Act confines the colonial trade to *Britiſh-owned* as well as *Britiſh-built* veſſels, I muſt affirm the ſentence of the Court below, condemning the ſhip.

With reſpect to the cargo, which belonged to different perſons, and was ſhipped under a perfect ignorance of the transfer of this veſſel, it was attempted to draw a diſtinction favourable to the intereſts of the owners.

Court.—I ſhall take ſome little time to conſider this caſe, for it appears to me to be one not only of ignorance, but of almoſt invincible ignorance; I really do not

The BEAVER.

April 28th, 1812.

not ſee how it was poſſible for the *Britiſh* ſhipper to find out the true character of this veſſel. Very long diſcuſſions and very long proceedings have been found neceſſary in order to enable this Court to come, at laſt, to the concluſion that this ſhip is not *Britiſh* property, and it is very difficult to ſay how this diſcovery could have been made by the *Britiſh* ſhipper. One cannot help feeling that, in caſes of this kind, innocent parties may be expoſed to great hazard and inconvenience. At the ſame time it muſt be recollected, that the navigation laws are of great and momentous importance, and very inflexible in their nature. The penalties impoſed by them may indeed, in ſome inſtances, fall hard upon individuals who have been no parties to the fraud, but the national benefit muſt take precedence of the profits of individuals. The law preſumes, too, that the party damnified has a remedy againſt the author of the miſrepreſentation by which his loſs may have been occaſioned; and though it may ſometimes happen that the perſon from whom the remedy is to be ſought is not in point of ſolvency able to make ſatisfaction, ſtill that circumſtance can make no difference in the legal principle, which remains unſhaken. It muſt likewiſe be obſerved, that it will, in many caſes, be a matter of great difficulty for the Court to find out what is ignorance and what is not, ſince the ſame courſe of proceeding may be uſed in diſhoneſt caſes and for diſhoneſt purpoſes. The abuſe that may ariſe from a toleration in one inſtance may prove extremely injurious to the navigation of the country, and foreign ſhips may, to a very great extent, have a colourable *Britiſh* character affixed to them for the purpoſe of intruding themſelves into a courſe of navigation which the national policy moſt ſtrictly prohibits any

The BEAVER.

April 28th, 1812.

any but *Britiſh* ſhips. It is poſſible that, upon theſe grounds, the Court may find it neceſſary to come to a concluſion different from that which its own private feelings might ſuggeſt.

May 14th, 1812.

On a ſubſequent day Judgment reſumed.

The ſubſtance of this caſe is, that the goods were imported from *Halifax* into *Quebec* in a ſhip oſtenſibly *Britiſh*, but not *bonâ fide* owned by *Britiſh* ſubjects. I have had occaſion, on a former day, to conſider what the character of the ſhip really was. She was ſailing under the *Britiſh* flag, and was manned by a *Britiſh* crew, but, in truth, had been transferred by ſale to *American* citizens, and was unlawfully uſurping the privilege of a *Britiſh* ſhip. The queſtion is, whether the cargo is liable to condemnation on the ground of having been illegally imported on board this *American* ſhip. There are circumſtances in the caſe that would induce the Court to regard it in the moſt favourable light, and to ſtretch as far as poſſible to give relief to the owners of this cargo. The parties have, I think, made out a caſe of perfect innocence of intention. The ſhip ſailed under *Britiſh* colours, was manned with a *Britiſh* crew, and had been cleared as *Britiſh* by a Court of Admiralty at *Halifax*. The ſhippers, therefore, had no reaſon to entertain a ſuſpicion that ſhe was not in every reſpect a *Britiſh* veſſel. Under theſe circumſtances it is impoſſible not to feel a deſire to relieve them from the penalties affixed by law upon caſes of illegal importation; but, at the ſame time, no door muſt be left open for the violation of the high intereſts which the navigation act was intended to protect. The act begins in a very ſolemn manner—" For the increaſe of ſhipping and encou-

12 Car. 2. c. 18.

" ragement

The BEAVER. — May 14th, 1812.

" ragement of the navigation of this nation, wherein, " under the good providence and protection of God, " the wealth, ſafety, and ſtrength of this kingdom is " ſo much concerned." It then goes on to enact, that " no goods or commodities whatſoever ſhall be " imported into, or exported out of any lands, iſlands, " plantations, or territories, to His Majeſty belonging, " or in His poſſeſſion, or which may hereafter belong " unto or be in the poſſeſſion of His Majeſty, His " heirs and ſucceſſors, in *Aſia*, *Africa*, or *America*, in " any other ſhip or ſhips, veſſel or veſſels whatſoever, " but in ſuch ſhips or veſſels as do truly and without " fraud belong only to the people of *England* or " *Ireland*, or town of *Berwick-upon-Tweed*, or are of " the built of and belonging to any of the ſaid lands, " iſlands, plantations, or territories, as the proprietors " and right owners thereof, and whereof the maſter " and three-fourths of the mariners, at leaſt, are *Eng-* " *liſh*, under the penalty of the forfeiture and loſs of " all the goods and commodities which ſhall be " imported into, or exported out of any of the afore- " ſaid places in any other ſhip or veſſel, as alſo of the " ſhip or veſſel, with all its guns, furniture, tackle, " ammunition, and apparel." Now, it is proper here to conſider upon whom is laid the obligation which this law impoſes; and I think, by the true conſtruction of the firſt ſection of this act, that it is laid upon the owners of the goods, and not upon the owners of the ſhip, for it does not prohibit a ſhip foreign owned from entering the colonial ports, but enacts, that *goods ſhall not be imported* in any but *Britiſh* veſſels. It impoſes, therefore, an obligation upon the owners of the goods to take care that they are put on board a proper vehicle. Upon whom is the penalty made to

The BEAVER.

May 14th, 1812.

attach? Why, upon the goods in the firſt place, and then, in a ſecondary way, upon the ſhip itſelf. The owners of the goods are required to aſcertain and be anſwerable for three things: Firſt, they are to know that the ſhip is *Britiſh*-owned; ſecondly, that ſhe is *Britiſh*-built; and laſtly, that ſhe is navigated by a *Britiſh* maſter, and that three-fourths of her crew are *Britiſh*, which it is abſolutely neceſſary that they ſhould be, except in time of war, when this part of the ſtatute is relaxed. Theſe regulations may occaſionally operate with great hardſhip upon the owners of goods. It may be very difficult for them to diſcover whether the ſhip is *Britiſh*-owned or *Britiſh*-built; it may be ſtill more difficult to aſcertain whether the maſter and two-thirds of the crew are *Britiſh*: They are frequently not hired till after the cargo is put on board the ſhip, and yet the owners of the goods are held reſponſible.

43 G. 3. c. 64.

It was conceived, I preſume, that the object of the ſtatute could not otherwiſe be attained, and the ſacred rights of *Britiſh* navigation upheld, if the penalties could be avoided under the plea of ignorance. I am therefore clearly of opinion, that, if the ſtrongeſt poſſible caſe of ignorance were made out, it would not avail to protect the parties from the penalties impoſed by this ſtatute. What would be the conſequence if the Court could entertain a plea of this nature? The *onus probandi* muſt then be thrown upon the ſeizor, which is contrary to a leading principle of fiſcal law. The parties would have nothing to do but to obtain the neceſſary documents, and then, by a colluſive privity between the owners of the goods, which it would be impoſſible for a third party to detect, foreign veſſels would be admitted to all the privileges of *Britiſh* navigation. Caſes of this kind, therefore, though

they may operate with great hardſhip upon innocent individuals, yet they are hardſhips which the legiſlature has thought fit to impoſe, as neceſſary to maintain the great ends of the law. The principle on which theſe penalties are founded, is not only confined to caſes of illegal importation, but common to other parts of fiſcal law. Inſtances of the kind are of perpetual and almoſt daily occurrence. Smuggled goods put into a waggon, together with articles of an innocent deſcription not only become liable to confiſcation themſelves, but induce, alſo, a forfeiture of the waggon and the innocent goods with which they are aſſociated.

This caſe of ignorance has been aſſimilated in the arguments of counſel to caſes of neceſſity and impoſſibility, upon which the Court has thrown out ſome obſervations expreſſive of its inclination to relieve the parties from the penalties which the law, under a ſtricter interpretation, might ſeem to require. But there is this manifeſt diſtinction between caſes of phyſical neceſſity and caſes of ignorance. In caſes of *vis major*, as where a ſhip is compelled by a ſtorm to put into an interdicted port, the maſter proteſts againſt the winds and waves, but he cannot bring his action, there is no perſon againſt whom he can have his remedy. It is otherwiſe where a party is impoſed upon by falſe appearances, for he has then a remedy againſt the perſon by whom he has been deceived. It may, perhaps, have happened, in the preſent caſe, that the perſons by whom the ſhippers of this cargo have been deceived in the character of the veſſel, are not in a ſtate of ſolvency; but, though not ſolvent, they are ſtill amenable to the law, and may be made to anſwer in their perſons what they cannot in their purſes. At any rate, it is the only remedy to which the law refers the ſufferers.

The BEAVER.

May 14th, 1812.

sufferers. It would be dangerous in the extreme if the Court were to allow any relaxation of that penal principle which makes the goods liable to confiſcation on being unlawfully imported in a foreign ſhip. I am therefore under the neceſſity of condemning the cargo as well as the ſhip.

VROW DEBORAH, LUYK.

May 6th, 1812.

A licence not granted till after the fact of capture, though bearing a previous date, can afford no protection.

THIS was the caſe of a ſhip under *Pruſſian* colours, which was captured *on the 24th January* 1812, whilſt in the proſecution of a voyage from *Amſterdam* to *London* with a cargo of cheeſe. There was an expired licence on board, permitting the veſſel to come from *Norden;* and there were alſo ſeveral other documents repreſenting the ſhipment to have been made in that port. A claim was given for the ſhip and cargo, as protected by another licence, purporting to be dated on the *20th of January* 1812. On the part of the captors, an affidavit was brought in, by permiſſion of the Court, in which it was ſworn, that from inquiries made at the council-office from one of the principal clerks, it appeared, that a petition had been preſented on the *20th of January*, for a licence to import from *Amſterdam* on board the *Vrow Deborah* a cargo of butter, cheeſe, and grain, and that ſuch petition had been *refuſed* on the ſame day, and the refuſal thereof entered in the regiſtry-book of the council-office; that no further application was made reſpecting the licence till *the 30th of the ſame month*, when the claimant again attended, and added the following words to his petition, " The butter and cheeſe to be warehouſed

" for

The Vrow Deborah.

May 6th, 1812.

" for exportation in *Britiſh* Ships;" whereupon a licence was directed to be granted. The claimant was ordered by the Court to produce and verify the directions and inſtructions under which he applied for the licence, and to explain the circumſtances which attended the application for, and the grant of, the licence. The claimant in his atteſtation depoſed, that in purſuance of directions received by his houſe of trade on the 18*th of January*, in a letter from their correſpondent at *Amſterdam*, he on *the* 20*th of the ſame month* applied to the Privy Council by petition, for a licence to import butter, cheeſe, and grain, from *Amſterdam* to *London*, on board the *Vrow Deborah*; that, on making application for the ſaid licence *a few days afterwards* at the Council Office, he was informed, it was *withheld* on the ground that the petition did not contain the clauſe, that the goods ſhould be warehouſed for exportation; that he had before obtained licences on preſenting ſimilar petitions; but it being ſuggeſted to him, that, as a matter of regularity, it would be neceſſary to inſert the ſaid clauſe in the petition, it was accordingly done, and a licence was immediately ordered for the protection of the ſhip and cargo. Further explanation was demanded by the Court, and an affidavit was brought in by each party, reſpecting ſome alterations which had been made in the regiſtry-book of the Privy Council. The queſtion was, whether the licence would enure to the protection of this ſhip and cargo, which had been captured on the 24*th of January*.

JUDGMENT.

Sir *W. Scott*.—This is the caſe of a ſhip and cargo which were taken on the 24th of *January* laſt; and

The VROW DEBORAH.

May 6th, 1812.

which have been claimed as protected by a licence. There was a licence on board, which permitted the veſſel to come from *Norden* with a cargo to whomſoever the property might appear to belong: ſeveral papers and letters were alſo found on board, none of which, I think, throw any ſort of imputation on the writers of them, except one—I mean the letter No. 13, written by the ſhipper in *Holland*, which certainly does contain ſome directions improperly given, and which proves the cargo to have been ſhipped at *Amſterdam*, in contradiction to the licence permitting the veſſel to come from *Norden* only. The maſter was inſtructed to ſay, the ſhip came from *Norden*, and that the ſhipment was made in that port; but from theſe inſtructions he has very properly departed, and has fairly diſcloſed the fact, that the whole cargo was put on board at *Amſterdam*. The letter certainly contains paſſages, which are not conſiſtent with fair dealing on the part of the *Dutch* ſhipper. The other letters are free from any impropriety whatever, and are not calculated to make any impreſſion upon the mind of the Court, diſadvantageous to the writers of them. That letter being found on board, naturally enough ſuggeſted to the captors an idea, that all was not fair, that there was ſomething in the tranſaction which required further examination; and more particularly ſo, when a claim was given in, relying not upon this licence which was on board, but upon another, which purported to be dated on the 20th of *January*, the former being a licence which had expired nearly three months, at the time it was put into uſe.

The licence, under which protection is claimed, is dated on the 20th of *January*; but it ſeems the appearance of this licence inflamed the ſuſpicions which the captors

The VROW DEBORAH.

May 6th, 1812.

captors had before entertained, and put the parties upon an inquiry, founded on a ſuppoſition of fraud. What was the particular ſpecies of fraud imputed, I do not know; but it does turn out in the courſe of the inquiry, that the licence was not granted on the actual day on which it bears date. It appears that an application had been made at the Council Office on the 20th of *January*, for a licence generally to import, and that it had been *refuſed* or *withheld*; I do not underſtand that there is much ſubſtantial difference between the two terms: it was *not granted*; and that is the meaning of both theſe words. —That it was not permitted to iſſue till ſome days afterwards, appears from Mr. *Baker*'s own affidavit, who made the application; and that, I think, is a circumſtance, which moſt materially diſtinguiſhes this caſe from thoſe which were referred to at common law, reſpecting the incompetency of parties to aver againſt the authenticity of public inſtruments. Here it is the party himſelf, who impeaches the document; he admits that it was applied for on the 20th of *January*, but ſays that it was withheld. It was ſome days before the licence was granted; and then it was with a condition of exportation annexed to it: it can never be ſaid, that this is a document without ſuſpicion, when it is admitted by themſelves not to have been obtained on the day, on which it purports on the face of it to have been granted. Here is no attempt made *aliunde*, and by other parties, to impeach the inſtrument, but you admit the fact, with reſpect to the incorrectneſs of the date.

In this ſtate of the caſe, the matter has been brought before this Court for its deciſion, and imputations have been thrown out in the arguments of counſel, as if the tranſaction bore hard upon the cha-

The VROW DEBORAH.

May 6th, 1812.

racter of Mr. *Baker*, by whom the licence was obtained; but I profeſs I do not ſee any thing improper in the conduct of that gentleman. I think there was ſufficient authority given to him to apply for the licence; the letter indeed ſhews that Mr. *Brandon*, and not Mr. *Baker*, ſhould have obtained the licence; but I ſuppoſe it was thought better, that the ſhip-broker ſhould do it. And I obſerve that there are other letters written by the ſhipper at *Amſterdam*, which imply an underſtanding, that Mr. *Baker* had received orders to obtain a licence; there is, therefore, no want of authority to empower Mr. *Baker* to make the application.

I do not obſerve that, in the order given by *Klinkert* at *Amſterdam*, there is any intimation that the licence was to be for re-exportation: it was to be for importation; and where it is ſo expreſſed, it muſt be taken to have been the underſtanding of the parties, that the licence was to be for importation only, and not for re-exportation. In theſe terms Mr. *Baker* made his application to the Council, and the licence, it appears, was *withheld* or *refuſed*; in ſhort, it was not granted: he was unable to obtain permiſſion to import generally; it appears, therefore, that the Board of Trade underſtood the application in the ſame way. Application was made for liberty to import abſolutely, and without any ſuggeſtion of exportation; and afterwards, upon his coming to the Council Office to know the ſucceſs of his application, and being informed that it was not granted, and that there muſt be, as the clerk expreſſed it, a condition annexed of exportation, he was willing to take it in that form, and in that form it was finally granted, with a reference back to the date of the firſt application. I cannot ſay that this courſe of conduct

The VROW DEBORAH.

May 6th, 1812.

throws any blame on Mr. *Baker*, particularly when connected with the circumſtances ſtated by him, that he had before made application in the ſame ſtyle, which had been granted with modifications and conditions annexed. It was natural that he ſhould purſue the ſame courſe upon the preſent as he had done upon former occaſions. How far the practice, which ſeems to have obtained, of carrying back dates, may be correct, it is not for me to ſay; it ſhould ſeem to be a practice likely to lead to many and great inconveniences. Here is an application for a licence to import generally; That is refuſed, and nine or ten days afterwards comes an application for one to import for the particular and ſpecial purpoſe of re-exportation; and then it ſeems, that the date of this new application, which is of a different kind, and for different purpoſes, is wholly paſſed over, and the date of the former application, which had been refuſed, is affixed to the inſtrument founded on the ſecond application. If this mode of affixing dates has been occaſionally practiſed, it might naturally enough lead Mr. *Baker* into the courſe of conduct purſued by him, and does, I think, exempt him from any cenſure on the occaſion. Perhaps the moſt convenient and direct mode in all theſe caſes would be, for the merchant to ſtate, upon the original application, whether he means it for importation only, or for re-exportation. The Council would then ſee at once the nature of the application, and they would naturally refer the licence back to the time of the application. It cannot be expected that the Council ſhould, at all times, on the inſtant an application is made, be ready to iſſue the grant: it cannot be expected that it will be ſitting day and night to receive applications, and immediately to iſſue the licences.

The VROW DEBORAH.

May 6th, 1812.

I presume it to be the practice of the Council to interpose a day between the application and the grant; and then, if they see no objection to the proposed course of trade, to refer the date of the licence to the time when the application was made for it. But when the original application is rejected, and after an interval of many days an application of a different kind, and for a different purpose, is made, and the prayer of it granted, it does appear to be something like an inaccuracy on the part of the inferior Officers of the Council, to affix the date of the one to the grant of the other. If, however, it has been the practice so to do, I do not think the merchant, by whom the application was made, is at all to be blamed for accepting the licence in the form in which it has been usual for them to be issued. It was not the business of Mr. *Baker* to quarrel with the licence on that head, and to say, I did not ask for the licence till the 25th or 26th, and here you have dated it on the 20th, the time at which you refused the licence I then applied for. He very properly accepted the licence in the state in which it was offered to him; and the utmost that can be alleged against him is, that he did not disclose the fact of capture, which had taken place in the intermediate time. Whether he was informed that the capture had been made, does not exactly appear; but, suppose him to have been acquainted with the circumstance, yet when the Council carried back the date of the licence to the 20th, I do not see that the obligation upon him, to disclose it, was of a very pressing kind, for at that time the capture had not taken place. I do not think there is any ground for censuring the conduct of Mr. *Baker*.

The

The Vrow Deborah.

May 6th, 1812.

The queſtion comes to this:—Is it ſhewn that there was any licence in exiſtence at the time when the capture was made? I think it is incumbent on the party making the claim, to ſhew that he was at the time furniſhed with a protection; and, when he has admitted that the date of the licence is incorrect, when he has admitted that he made his firſt application on the 20th, and that, upon calling ſome days afterwards, he found the licence had not been granted, can I ſupport it upon a mere date which the party himſelf admits to be incorrect? Admitting that there is good faith in the tranſaction, and thinking that the conſequence may bear hard upon an innocent party, what is the Court to do, or how is it to relieve him from his difficulty? The Court muſt neceſſarily be governed by the principle which it has laid down and acted upon in other caſes, that a licence does not act retroſpectively, and cannot take away an intereſt which is veſted, in point of law, in the captors. The Court has laid down this principle, and it has not hitherto been impeached. In what light the matter may be viewed in the ſuperior Court, it is not for me to conjecture; but it ſtands as a decided rule in this Court, and muſt be adhered to, till it ſhall be reverſed by the deciſion of a higher tribunal. The caſe appears to be free from fraud; but that is a circumſtance which cannot alter the judgment I find myſelf under the neceſſity of giving. A ſuperior court with more extended powers may, perhaps, be inclined to grant the party that relief which it is unfortunately out of my power to beſtow.

To give protection, the exiſtence of the licence at the time when the capture took place muſt be preſumed: the party has not averred this to be the caſe; and the ſtyle in which he expreſſes himſelf in the

The Vrow Deborah.

May 6th, 1812.

affidavit implies ſo abſolutely the contrary, that I muſt take the contrary to be the fact. I am bound to believe that the licence was not in exiſtence: if ſo, how can I, conſiſtently with thoſe principles to which this Court has adhered, give to this caſe any protection which is to be derived from a licence ſubſequently granted. I am afraid, under all theſe circumſtances, that nothing remains for the Court, but to pronounce that neither this licence, nor that which was on board at the time of capture, is ſufficient to protect the ſhip and cargo.——Ship and cargo condemned.

November 4th, 1812.

HENRIETTA, Jurgensen.

Licence to export a cargo from *Leith* to any port in *Denmark*, with liberty to touch at *Chriſtianſand* for clearance—part of cargo taken on board at that port—ſhip and goods property of the ſame owner—Condemnation.

THIS was the caſe of a ſhip under *Daniſh* colours, with a licence permitting her to export a cargo of coals and other goods, from *Leith* to any port in *Denmark*, with liberty to touch at *Chriſtianſand* for clearance. At the time of capture ſhe was proceeding on her voyage to *Copenhagen*, with a cargo conſiſting partly of coals, which were laden at *Leith*, in conformity to the terms of the licence, and partly of train-oil, which was put on board at *Chriſtianſand*.

For the Captors.—*The King's Advocate* and *Herbert* contended, that the ſhip was permitted by the licence to call at *Chriſtianſand* for clearance, and for no other purpoſe, and muſt be ſubject to condemnation, becauſe ſhe had made a fraudulent uſe of that permiſſion. That the oil, which had been put on board at

at *Chriſtianſand*, was clearly liable to confiſcation, and that the ſhip and the remaining part of the cargo, as belonging to the ſame perſon, muſt likewiſe be condemned under the authority of the *Julia, Ropes*.*

For

---

* The *Julia, Ropes*, was an *American* ſhip, laden, at the time of capture, with a cargo conſiſting of 101 bales of cotton, 10 hogſheads of tobacco, and a quantity of logwood and fuſtick. She ſailed originally from *Salem* in *America*, to *Tonningen*, and from thence to *Rendſburg*, where part of her cargo was delivered, and other goods put on board. The veſſel then proceeded through the *Kiel* Canal in the proſecution of her voyage to *Wiſmar*, off which port ſhe was captured by an *Engliſh* cruizer. The Court, after ſtating the facts of the caſe, and the evidence by which they were ſupported, ſaid—

This caſe differs from that which came before the Court the other day, where it was aſſerted, that the veſſel was merely to paſs through the canal on her way to *England*. The mere paſſing through a canal leading to another ſea, with an intention of forwarding the voyage, if held to be illegal, would be an extenſion of the law of blockade beyond what it has hitherto been carried. There may be great inconvenience attending ſuch a courſe of navigation, where there are ports upon a canal of this deſcription, becauſe it is obvious that a veſſel may take advantage of the opportunity to depoſit her cargo there; but the evil muſt be counteracted by ſome direct prohibitory meaſure. To fix the parties with an intention of delivering at ſome of thoſe ports, upon a fact ſo ambiguous in itſelf as that of entering this canal, which may be, and, I preſume, is frequently uſed as a mere canal of tranſit, would be a very harſh application of the law of blockade. Suppoſe, for inſtance, we were at war with *Sweden* as well as *Denmark*, would the paſſage of the Sound on that account become illegal, becauſe there are enemies on the one ſide and on the other, no order having been iſſued to prohibit the paſſage of the Sound? Now this is a canal which paſſes through the territories of a ſovereign with whom we are at war, and although force might be applied to compel

veſſels

The HENRIETTA.

November 4th, 1812.

For the Claimants.—*Stoddart* and *Phillimore* contended, that this being the caſe of a ſhip under licence, It would not be ſubject to the ſame conſideration as the caſe cited by the King's Advocate, which was that of an *American* veſſel, captured for a breach of the blockade impoſed by the Order in Council of the 7th of *January* 1807. That the main object of Government in granting theſe licences, was the encouragement of

---

veſſels paſſing through it to deliver their cargoes in his ports; yet it does not neceſſarily follow, that it would be, or that it has been, ſo applied. I own, I am ſo far decided on this point, that in the caſe which came before the Court the other day, I was not diſpoſed to hold the intention of paſſing through this canal a violation of the Order of the 7th of *January*, which does not interdict the paſſage of this canal, but only prohibits all trade between ports from which the *Britiſh* flag is excluded. The preſent caſe, however, has clearly nothing in common with that of the former day. This *American* maſter had certainly a right to go to *Rendſburg*; but there he originates an entirely new ſpeculation, and is proceeding with a cargo from that port to *Wiſmar*. The cotton, which is the great bulk of the cargo, was taken on board at *Rendſburg*, and it is the great bulk of the cargo that will determine the fate of the other artioles. Then, with reſpect to the ſhip. In other caſes, where a few trifling articles have been taken on board, the Court has, with a view of mitigating the difficulties of the preſent times, exerciſed, if I may ſo expreſs it, a kind of judicial connivance; but the ſame indulgent conſiderations do not apply, where the principal ſhipment is illegal. Here the cotton is the bulk of the cargo, and it is impoſſible to ſeparate the ſhip which is employed in carrying this unlawful cargo from the cargo itſelf. The only remaining queſtion, therefore, is with reſpect to the 10 hogſheads of tobacco. Now, it is admitted, that the tobacco brought from *Salem* was landed at *Rendſburg*; but whether this is any part of the original cargo, *non conſtat*. As it is the property of the owners of the ſhip employed in this illegal tranſaction, the Court is not bound to take that benevolent view of their conduct which would incline it to aſſume the fact for the purpoſe of reſtitution.

exportation

exportation from this country, which had, in this caſe, been accompliſhed. That the oil formed only an inſignificant part of the lading, and that the penalty ought not to be extended to the ſhip and the innocent parts of the cargo. That the Court had ſo decided in the caſe of the *Louiſa*, *Grunder*, where it decreed reſtitution of the colonial produce, and contented itſelf with condemning the pitch and iron, which were not within the terms of the licence.

November 4th, 1812.

25th Oct. 1810.

JUDGMENT.

Sir *W. Scott.*—This ſhip was taken on a voyage from *Leith* to *Copenhagen*, with a cargo conſiſting of coals and train-oil, the ſhip and cargo both belonging to the ſame perſon, Mr. *Roſenſeilde*; for it is ſo repreſented by the mate, the only perſon who is acquainted with the tranſaction. With reſpect to the place of ſhipment, he ſays, " that the coals were put on board in the " month of *April* laſt, at *Leith*, and the oil at *Chriſ-* " *tianſand* about eight days before they ſailed; that " the coals conſiſted of one hundred and forty tons, " and the oil about one hundred caſks." The licence permits this veſſel " to export from *Leith* to any port " in *Denmark*, with liberty to touch at *Chriſtianſand* " for clearance, a cargo of coals and ſuch goods as " are permitted by law to be exported." The ſhip ſails then with her cargo, or at leaſt part of her cargo, from *Leith*, with permiſſion to touch at *Chriſtianſand* for one ſolitary purpoſe, that of obtaining a clearance. Mr. *Roſenſeilde*, the owner, was at *Leith* at the time when the coals were put on board; and it appears alſo, that he was at *Chriſtianſand* whilſt the ſhip was in that port. Whether he ſailed from *Leith* to *Chriſtianſand* in this veſſel does not exactly appear, but the fact

The HENRIETTA.

November 4th, 1812.

fact is certain, that he was preſent on both occaſions. He muſt, therefore, be deemed perfectly cognizant of every thing that has been done. Now, in what manner has this tranſaction been conducted? Does it bear upon the face of it the ſtamp and appearance of good faith, and of an honeſt intention to apply the licence to the purpoſe for which it was granted? The former maſter, who had ſailed from *Leith* to *Chriſtianſand*, was removed from the ſhip; and when I am told, that he was diſcharged on account of ſickneſs, I confeſs, that I cannot help entertaining ſome doubts of the truth of that account. If this were the real ſtate of the caſe, it ſeems hardly poſſible that the mate and the new maſter ſhould be ignorant of the fact, and yet they make no ſuch ſtatement in their depoſitions. The only evidence to which I am referred for the verification of this particular, is the indorſement on the licence made by this Mr. *Roſenſeilde*, the owner, who is himſelf the author of the fraud, if there be fraud in the caſe. The preſent maſter is put on board only the day before the veſſel ſailed, and is left in a ſtate of entire ignorance as to the ſhipment of the oil at *Chriſtianſand*. Theſe circumſtances give to the caſe a ſtrong colour of a fraudulent intention; and, as every thing paſſed with the perfect knowledge of the owner, and was done in his immediate preſence, I muſt conclude that the whole of the cargo is, as the mate repreſents it to be, his property, and that he is reſponſible for the breach of the licence.

The next queſtion is, what is to be the conſequence of this miſconduct; whether it is to be viſited with a confiſcation of the prohibited article only; or whether the penalty is to be further extended to the ſhip and remaining part of the cargo? Why, it is ſaid, that the

The HENRIETTA.

November 4th, 1812.

the licence ought to be conſtrued beneficially for the parties, and that the object of the Government in granting theſe licences is the encouragement of exportation from this country. The exportation of the produce and manufactures of this kingdom is undoubtedly an object of great importance in the eyes of His Majeſty's government; but it may be a matter of ſerious injury to this country, if the commerce of the enemy is to be carried on in ſecurity under the abuſe of *Britiſh* licences. The parties may take heavy goods from the ports of this country, and then carry on the coaſting trade of the enemy in more valuable articles. By ſuch a miſapplication of licences, the advantages in favour of the commerce of this country would be greatly overbalanced: the conſequences which muſt enſue would be miſchievous in the extreme. It is, therefore, the duty of the Court, as far as lies within its power, to guard againſt ſuch fraudulent application of licences. It has been attempted to aſſimilate this caſe to that of the *Louiſa*, *Grunder*; but, in my opinion, the caſes are very diſſimilar. A licence to proceed to a port of the enemy for the purpoſe of trading in certain enumerated articles, and a licence to touch at a hoſtile port, for the mere purpoſe of obtaining a clearance, are very diſtinguiſhable, and muſt be ſubject to very different conſiderations. In the caſe which has been mentioned, there was a liberty of trading in a variety of articles; there was likewiſe an abſence of all fraud. Here there is a total and eſſential departure from the conditions of the licence. Here is, likewiſe, abundant proof of fraudulent intention. From an extreme unwillingneſs to preſs upon the commerce of the country, the Court did not, in the former caſe, hold it

The HENRIETTA.

November 4th, 1812.

it to be a fatal departure from the licence to take on board non-enumerated goods. You may miſtake as to the deſcription of goods enumerated or non-enumerated: but here, where you break through the eſſential condition, where there is a total excluſion of all trade, the act cannot have ariſen from miſtake or inadvertence. The judgment of the Court, in the other caſe, therefore furniſhes no authority upon which the preſent caſe is to be decided.

With reſpect to what has been ſaid, as to the hardſhip of ſuffering the confiſcation of a valuable ſhip and cargo, merely becauſe a ſmall part of the goods have been put on board in an irregular manner, I can only ſay that the preſent caſe furniſhes no ſuch argument. One hundred caſks of oil form no ſmall or inſignificant part of the cargo on board this ſhip. I think, under all the circumſtances, that I do not go beyond what the ſtrict juſtice of the caſe demands from me, in pronouncing for the condemnation of this ſhip and the whole of its cargo.

BENNET, PARTRIDGE, otherwiſe YOUNGHUSBAND.

November 4th, 1812.

Licence to *American* ſhip by name to proceed to *San-Lucar*—ſhip employed turns out to be *Britiſh* property.—Queſtion as to ſtate of *San-Lucar*—Order in Council reſpecting ceſſation of hoſtilities with *Spain*.—Reſtitution.

THIS was the caſe of a ſhip under *American* colours, which had been captured on her outward voyage from *London* to *San Lucar*, by an *Engliſh* ſhip of war, the *Rebuff*, and carried into *Gibraltar*, where ſhe was releaſed by a ſentence of the Vice-Admiralty Court. She was again captured in *July* 1812, by His Majeſty's hired armed cutter, the *Earl Spencer*, whilſt in the proſecution of her return-voyage from *San Lucar* to *London*, laden with a cargo of wool and wine. There was a *Britiſh* licence on board at the time of capture, granted to Meſſrs. *Gordon*, *Murphy*, and Company, allowing them "to load and export a cargo of ſuch goods as are permitted by law to be exported *on board the American ſhip*, *Bennet*, *Younghuſband*, *Maſter*, of about two hundred tons burthen, from *London* to *San Lucar*, and to import from thence a cargo of wines, fruit, liquorice, quickſilver, and other *Spaniſh* produce to the port of *London*." It appeared from the depoſitions, that *Partridge*, the maſter and part-owner of this ſhip, had aſſumed the name and character of *Younghuſband*, the former *American* maſter, for the purpoſe of this voyage; and that the ſhip, though ſailing under *American* colours, was the property of himſelf and of Meſſrs. *Gordon*, *Murphy*, and Company, alſo *Britiſh* ſubjects. It appeared, likewiſe, that ſhe

was

The BENNET.

November 4th, 1812.

was an *American* built ſhip, but had been regularly condemned at *Antigua*, and purchaſed by the maſter for himſelf and the other part-owners. A *Britiſh* regiſter had not actually been procured for this veſſel, but the certificate of condemnation at *Antigua* had been left at the cuſtom-houſe, in *London*, in order to obtain one on the return of the veſſel from her preſent voyage.

On behalf of the captors, the King's Advocate and Luſhington.—This ſhip and cargo are claimed as *Britiſh* property, and can, therefore, derive no protection from the licence which is granted for an *American* ſhip. The Court has already decided this point in the caſe of the *Jonge Arend*, where it held a *Britiſh ſhip* ſubject to condemnation for trading under a licence granted for the importation of certain articles on board a *neutral ſhip*. The licence in the preſent caſe could have been obtained in no other way than by a fraudulent miſrepreſentation of the national character of this veſſel; for, if the privy council had been made acquainted with the true ſtate of the caſe, the licence would not have been granted. *San Lucar* having reverted to the permanent poſſeſſion of the *French*, muſt be conſidered as ſtrictly blockaded, and conſequently all veſſels would be liable to capture for attempting to enter the port. Even if the original blockade had ceaſed to exiſt, a new blockade has been impoſed by the order of *December* 1811. Under theſe circumſtances it is impoſſible to contend that the licence produced can enure to the protection of this veſſel.

5 Robinſon, 14.

For

The BENNET.

November 4th, 1812.

For the claimants, Arnold and Herbert.—This is an *American* prize-ſhip, purchaſed by *Britiſh* merchants, and employed by them in carrying on a trade very beneficial to this country. The real character of the veſſel was diſguiſed, and ſhe continued to paſs as an *American* ſhip; not, as has been repreſented, for the purpoſe of impoſing upon the *Britiſh* government; but in order to protect the property in caſe *San Lucar* ſhould happen to be in the poſſeſſion of the *French* upon her arrival at that place. No objection could ariſe on the part of the *Britiſh* government to the employment of an *Engliſh* veſſel in this courſe of trade; ſince a communication with the ports of *Spain* is allowed to all *Britiſh* ſubjects. *San Lucar* is not in that ſtate of ſtrict blockade which has been repreſented by the counſel for the captors, the blockade, which had been impoſed during the late war, having been withdrawn upon the eſtabliſhment of peace between this country and *Spain*. By the Order in Council, declaring the ceſſation of hoſtilities againſt *Spain* on the part of His Majeſty, it is declared, "that the blockade "of all the ports of *Spain*, except ſuch as may be ſtill "in the poſſeſſion or under the controul of *France*, "ſhall be forthwith raiſed."—The *French* troops were not in the poſſeſſion of *San Lucar* at the time when this Order was iſſued, and conſequently that port ceaſed to be blockaded. It has been ſuggeſted, that there was a renewal of the blockade in *December* 1811; but upon reference to the terms of the order by which the new blockade was impoſed, it appears to have been of a very limited and partial nature, merely prohibiting the admiſſion of certain articles, and there is nothing in the evidence to ſhew that this ſhip was laden with any ſuch prohibited goods. No fraud could have been intended

4th *July* 1808.

The BENNET.

November 4th, 1812.

againſt the government of this country, ſince it appears from the depoſitions of the maſter, that the hiſtory of the veſſel was diſcloſed, without reſerve, at the cuſtom-houſe; and the certificate of her condemnation left there for the purpoſe of obtaining a *Britiſh* regiſter. The mere entrance of the *French* troops could not in Itſelf have the effect of renewing a blockade that had ceaſed to have exiſtence. *Spaniſh* property belonging to perſons reſident in a part of *Spain* ſubject to the power and controul of the *French*, has been reſtored by this Court, under the Order in Council of the 4th of *July* 1808, in the caſe of the *Santa Anna*, *Larrinago*. It cannot, therefore, be ſaid, that the property of *Britiſh* ſubjects is liable to confiſcation, for trading at a place in the mere temporary poſſeſſion of the enemy. It does not even appear with certainty, that the port of *San Lucar* was under the complete controul of the *French*. The laders of part of the cargo are *Engliſhmen*, reſident in *San Lucar*, which would hardly have been permitted by the enemy, if they had acquired the entire dominion of the place. On theſe grounds it is ſubmitted, that the claimants are entitled to reſtitution.

Edwards' Rep. 180.

The King's Advocate and Luſhington in reply.—The ſhip and cargo have not been brought within the terms of the licence, under which alone the claimants could have been entitled to the reſtitution of their property, nor has it ever been decided that *Britiſh* ſubjects are at liberty to trade with ports in the poſſeſſion of the enemy. A queſtion has been raiſed in the courts of common law, as to the legality of the trade carried on by *Britiſh* merchants with *Liſbon* and *Oporto*, whilſt in the poſſeſſion of the *French* forces, and though the point has not hitherto been finally decided, yet the

opinion of thoſe courts appeared to incline againſt the legality of the trade.

The BENNET.

November 4th, 1812.

JUDGMENT.

November 6th,

Sir *W. Scott.*—This ſhip was taken under *American* colours, on a voyage from *San Lucar* to *London*. She was ſailing with a licence on board, permitting Meſſrs. *Gordon, Murphy*, and Company, to export a cargo from *London* to *San Lucar, on board the American ſhip, Bennet, Younghuſband maſter*, and to import from thence a cargo of wines and other *Spaniſh* produce to the port of *London*.

It is neceſſary to conſider, in the firſt place, what was the ſtate of *San Lucar* at the time when this tranſaction took place. The laſt order in council made with reſpect to that port, prohibits the admiſſion of certain articles therein enumerated; but with goods of every other deſcription, the ſhips of *America*, and of all neutral nations, were at perfect liberty to enter. It is, therefore, I think, clearly eſtabliſhed, that the port of *San Lucar* was placed under a qualified blockade only; and, unleſs it can be ſhewn, that this ſhip carried prohibited goods on her outward voyage, the tranſaction in which ſhe was engaged muſt be conſidered entirely innocent. That ſhe was not laden with any of the articles excepted in the order of council may fairly be inferred from the cuſtom-houſe clearance, which ſhe obtained in this country, and likewiſe from the circumſtance of her having been captured on her outward voyage, and reſtored at *Gibraltar*. The veſſel, it appears, had been taken by an *Engliſh* ſhip of war, the *Rebuff*, and carried into *Gibraltar*, where ſhe was releaſed by a ſentence of the Vice-Admiralty Court. The queſtion before that Court muſt have been

The BENNET.

November 6th, 1812.

been precisely the same as that now made here, namely, whether the voyage was legal or illegal? so that the question which I am now called upon to decide, is already *res adjudicata*. The Vice-Admiralty Court pronounced a sentence of restitution, having a knowledge of all the circumstances now brought to the notice of this Court; for if the ship was engaged in an illegal transaction, the illegality was at that time consummated. The question has already been determined by a competent tribunal, from which no appeal lies to this Court, and this previous determination might, I think, have been opposed with success, as a bar to any inquiry in this place. But if I am to look into the circumstances attending the outward voyage, I must say, that I concur entirely in opinion with the Judge of the Court at *Gibraltar* respecting the legality of this transaction.

The ship sailed with *American* documents, and under *American* colours; but it appears that she had *English* colours also on board, and that she is in fact *British* property, having been regularly condemned as prize, and purchased by *British* owners, though she had not yet obtained a *British* register. That was a matter in abeyance when she sailed from this country, and, I presume, continues to be so up to the present time. Having put into *Cadiz* in distress, the master applied for assistance to the *American* Consul, who obtained possession of the ship's papers, and afterwards refused to deliver them up. Now, it has been contended, that this, being a *British* ship, application ought not to have been made for the licence as for an *American* ship. *Non constat* that the application was so made: the petition to the Privy Council for the licence is not before the Court; so that it is impossible to say what might be the nature of the application there made.

The fact, that the ſhip had become the property of *Britiſh* ſubjects, does not appear to have been diſſembled. The officers of the cuſtoms were put into full poſſeſſion of all the circumſtances. The certificate of condemnation, which the maſter, in his depoſition, calls the "Certificate of Freedom," was produced at the Cuſtom-houſe, and left there for the purpoſe of obtaining a *Britiſh* regiſter. It is impoſſible, therefore, to ſay, that the aſſumption of the *American* character was for the purpoſe of concealment and of fraud upon the *Britiſh* government; the diſguiſe muſt have been aſſumed for the purpoſe of gaining admiſſion at *San Lucar*, on account of that part of *Spain* being in a ſtate of war with this country, if ſo to be conſidered. Nothing is proved, or even alleged, againſt the conduct of the parties with reſpect to any breach of the revenue laws of this country: on the contrary, every part of the tranſaction is brought to the knowledge, and the ſhip ſails with the permiſſion, of that branch of the government which is intruſted with the adminiſtration of thoſe laws. It has been ſtrongly urged, in argument, that *Britiſh* ſubjects are not at liberty to enter the port of *San Lucar* for the purpoſes of trade, becauſe that place is now under the dominion of *France*, and muſt therefore be conſidered as forming part of the territory of the enemy. That part of *Spain* in which *San Lucar* is ſituated ſtands, indeed, on a peculiar footing with reſpect to its connection with this country. But the terms which are uſed in the Order of Council, iſſued by the *Britiſh* government, declaring the ceſſation of the war againſt *Spain*, are large and ſweeping—"All hoſtilities againſt *Spain* are immediately to ceaſe. The blockade of all the ports, "except ſuch as may be ſtill in the poſſeſſion or under "the

The BENNET.

November 6th, 1812.

The BENNET.

November 6th, 1812.

"the controul of *France*, are to be forthwith raiſed. "All ſhips and veſſels of *Spain* are to have free admiſſion into the ports of His Majeſty's dominions as "before the preſent hoſtilities." Words cannot convey a more general and unlimited declaration of peace and amity. I do not, however, mean to lay it down without any reſtriction, that *Britiſh* ſubjects are at liberty to trade with *Spaniſh* ports in the poſſeſſion of *French* troops, unleſs under the inſpection and with permiſſion of their own government; that would be going too far. But it has been the practice of all times to aſſume diſguiſe for the purpoſe of impoſing upon enemies. This is not to be deſcribed as a matter of innovation; the practice is as old as the records of this or of any other Court. *European* ſtates, when in declared hoſtility with each other, ſtand in need of commodities which can only be obtained from countries in the poſſeſſion of their enemies; and ſhips have, in all times, been permitted to aſſume diſguiſe for the purpoſe of ſupplying ſuch neceſſities. It is no new doctrine, that hoſtile ſtates procure from each other's territories ſuch commodities as are eſſential to their welfare, and that although the veſſels belonging to the reſpective belligerents are not permitted to enter the ports of their enemy for the purpoſes of trade, yet ſuch veſſels, under the diſguiſe of neutrals, or of allies, have conſtantly obtained admiſſion. On theſe grounds, I am of opinion, that this capture cannot be maintained; and I pronounce for the reſtitution of this ſhip and cargo on payment of the captor's expences.

DANKBAARHEIT, FORBECK.

November 6th, 1812.

THIS was the caſe of a ſhip under *Pruſſian* colours, laden with a cargo of cheeſe, and captured on a voyage from *Amſterdam*, with an aſſerted deſtination to the port of *Leith*. The ſhip and cargo were claimed as protected by a *Britiſh* licence on board, which was granted for the *Pruſſian* veſſel, the *Minerva*, *Hayes* maſter; and the queſtion was, whether a licence ſo granted would enure to the protection of this *Daniſh* veſſel, which had been ſubſtituted for the *Pruſſian* veſſel named in the licence. There was alſo a further queſtion reſpecting the fate of the cargo, in caſe the ſhip ſhould be held liable to condemnation.

Licence for a neutral veſſel will not enure to the protection of an enemy's veſſel. Cargo, if belonging to *Britiſh* ſubjects, not implicated in the fraud, protected.

For the Captors.—The King's Advocate and Adams contended, that a groſs fraud had been committed in the application of the licence, which was granted for a neutral veſſel, by name, and had been employed with a view of protecting the enemy's flag. That this *Daniſh* ſhip had been in the habit of trading between *Amſterdam* and the port of *Bergen*, and that her deſtination to *Leith*, on the preſent voyage, was by no means certain. That no doubt could be entertained as to the condemnation of the ſhip itſelf, and that the penalty muſt extend to the cargo likewiſe, unleſs it could be ſhewn that the parties to whom it belonged were ignorant of the abuſe which had been practiſed. That the bills of lading and the manifeſt were falſe with reſpect to the name of the ſhip and of the maſter, and that the laders of the cargo muſt have been cognizant of the fraud,

The DANKBAARHEIT.

November 6th, 1812.

since counterparts of these instruments were left in their possession, at *Amsterdam*. That these circumstances must be held sufficient to affect them with a knowledge of the fraud, and consequently to enure to the condemnation of the cargo.

For the Claimants of the ship.—Jenner and Lushington argued, that the clause in the licence, "to whomsoever the property may belong," would afford protection to an enemy's ship. That licences are frequently granted to *Danish* as well as to *Prussian* ships; and that it is a matter of indifference to the *British* Government what the national character of the vessel may be, provided the essential conditions of the licence, as to the quality and quantity of the goods, are complied with. That the Court has decreed the restitution of property under similar circumstances, in the case of

1811. *Job, Krons*, where the ship was described in the licence as *Swedish*, but was, in fact, *Russian* property. That no fraud could have been intended in the present case, since the papers were originally prepared for the individual ship named in the licence, and all the circumstances of the transaction had been disclosed without reserve by the master. That the *Prussian* ship, the *Minerva*, having been detained by the violence of the *French* government, the parties had innocently substituted this vessel, and were therefore entitled to restitution.

For the Claimants of the cargo.—Burnaby and Stoddart contended, that the laders had acted with entire good faith, and had complied, as nearly as circumstances would permit them to do, with the terms of the licence. That the identical cargo prepared for the

Prussian

The DANKBAARHEIT.

November 6th, 1812.

Pruſſian ſhip, the *Minerva*, had been put on board this ſhip, becauſe the former was not permitted to clear out from the *Texel* for this country. That no doubt could exiſt as to the real deſtination of this cargo to the ports of this kingdom. That, if fraud had been practiſed in the ſubſtitution of this ſhip for the other, *non conſtat* that the owners of the cargo, whoever they may be, were parties to the fraud. That in the caſe of the *Vrow Cornelia, Dykſtra*, a licence to bring a cargo in one veſſel, was held ſufficient to protect the ſame cargo ſhipped on board two veſſels. The Court there ſaid, "The *quantity* the government looked to; *that* "is the matter to be conſidered; and if the quantity "in two ſhips is only equal to what might have come "in one, where is the fraud? If you do not prove "that the quantity has exceeded the intention of the "grantor, you prove nothing." That in the preſent caſe the quantity had not been exceeded, the cargo conſiſting of the very ſame goods which had been prepared for the other ſhip, and that the claimants were entitled to the ſame lenient rule of interpretation.

Edw. Rep. 349.

The King's Advocate and Adams in reply.—The protection which has been ſet up for this ſhip, under the clauſe of the licence, "to whomſoever the property "may belong," can be of no avail: Thoſe words have always been conſtrued to apply to the cargo only; and it is impoſſible to put a different conſtruction upon them in this caſe, on account of the clauſe immediately preceding, by which the parties are expreſsly limited to the uſe of this *Pruſſian* ſhip, the *Minerva*. The caſe of the *Job, Krons*, is very diſtinguiſhable from that now before the Court. That was the caſe of a veſſel avowedly *Finniſh* property, to which a licence

was

The DANKBAARHEIT.

November 6th, 1812.

was granted by name, but with an erroneous deſcription of her national character, occaſioned ſolely by the recent transfer of *Finland* to *Ruſſia*. The other caſe, which has been mentioned, the *Vrow Cornelia*, differs alſo materially from the preſent caſe. There, the cargo had been actually purchaſed by the *Britiſh* merchants, who could not withdraw from the tranſaction without the total loſs of their goods. Being unable to make uſe of the individual ſhip for which the licence was granted, they came as near as they could to the terms of the licence, and employed other neutral veſſels. In that caſe, there was alſo an abſence of all fraud. Here a hoſtile, not a neutral, ſhip is ſubſtituted, and the buſineſs is conducted throughout in a fraudulent manner, the name of the veſſel and of the maſter being changed, for the purpoſe of avoiding *Britiſh* capture.

JUDGMENT.

Sir W. Scott.—This ſhip was taken on a voyage from the *Texel* to *Leith*, and was documented, at the time of capture, as the *Pruſſian* ſhip, the *Minerva*, commanded by a *Pruſſian* maſter. Upon inquiry, it turns out, that ſhe has no pretenſions to that appellation, but is *Daniſh* property, having every character of a *Daniſh* veſſel, and that the maſter is, in fact, a *Dane*, aſſuming the name of the former *Pruſſian* maſter. A protection is ſet up for this ſhip and cargo, under a *Britiſh* licence, permitting the importation of certain enumerated articles from *Amſterdam* to the port of *Leith*, on board the *Pruſſian* ſhip *Minerva*, *Hayes* maſter.

The queſtion is, whether it is in the power of the Court to apply this licence, ſo granted, to the protection of this *Daniſh* ſhip, with this *Daniſh* maſter on board.

The DANKBAARHEIT.

November 6th, 1812.

board. I need not repeat what I have ſo often ſtated, the anxious wiſh of this Court to relieve, as much as poſſible, the difficulties under which the commerce of the world now labours, and to apply the moſt favourable conſideration to the conſtruction of licence caſes. At the ſame time, it is neceſſary to be remembered, that the Court poſſeſſes the mere power of interpretation; that it muſt confine itſelf to a reaſonable explanation of the terms made uſe of, and cannot alter or diſpenſe with conditions conſidered as eſſential by the government granting the licence. If the Court aſſumes the power of extenſion by favourable interpretation, it does ſo only where there is a total abſence of *mala fides*, and where unavoidable obſtacles have been thrown in the way of an exact compliance with the terms preſcribed. Where there has been a want of good faith, or a departure from the terms beyond the neceſſity thus impoſed, the Court has not felt itſelf called upon to mitigate the penalties incurred by ſuch a deviation.

With reſpect to fundamental conditions, without meaning to lay down any very preciſe rule, I may venture to ſtate, that the Court is not in the habit of conſidering it a very eſſential deviation, if the ſhips of other countries than thoſe deſignated in the licence have been employed, provided the different countries had the ſame political bearing towards this kingdom. If *Pruſſia* and *Denmark* ſtood in the ſame relative ſituation with reſpect to *Great Britain*, licences would be granted to the veſſels of either country with equal facility. But the Court has never gone the length of holding it to be a matter of indifference to ſubſtitute a ſhip belonging to a country at war, for a neutral ſhip, at the will and pleaſure of the holder of the licence.

Many

The DANKBAARHEIT.

November 6th, 1812.

Many reaſons may induce Government to grant licences to neutral ſhips, where it would not beſtow the ſame indulgence upon ſhips belonging to the enemies of the country. I know that His Majeſty's Government has ſometimes granted licences for enemies' veſſels; but, becauſe licences have been ſo granted at particular times, does it therefore follow, that they would be granted all times? I cannot take upon myſelf to ſay, that the Crown would not, in the preſent caſe, have granted a licence for this very *Daniſh* ſhip; nor can I, upon the other hand, venture to ſay, that it would have done ſo. There may be reaſons inducing the Government to grant licences to *Daniſh* ſhips at one time, which do not exiſt at another. In the caſe which has been cited of the *Job*, when the Court held, that a licence granted for a *Swediſh* veſſel would enure to the protection of a *Ruſſian* veſſel, thoſe countries approaching much nearer to the ſame relative ſtate towards this country than *Pruſſia* and *Denmark* do at this time.

It does not appear exactly when this ſhip arrived at *Amſterdam*. She had plunged herſelf into difficulties by entering that port, and it might be a great object with the owners to extricate her from her ſtate of confinement. In all probability they were extremely deſirous of obtaining for her an exit from that port at the time when application was made for this licence. Mr. *Clark*, in the ſpecial affidavit which is annexed to the claim, ſays, that "he received orders and directions from Mr. *Smelt*, his correſpondent at *Amſterdam*, to apply to His Majeſty's Government for a licence to protect the *Pruſſian* veſſel *Minerva*, *Hayes* maſter, with a cargo of cheeſe, from *Amſterdam* to *Leith*." It appears, therefore, that the application for

The DANKBAARHEIT.

November 6th, 1812.

for this licence originated at *Amſterdam*. Mr. *Clark* goes on to ſay, that "in purſuance of ſuch orders and "directions, he applied for and obtained His Majeſty's "licence for the protection of the ſaid ſhip and cargo, "dated on or about the 28th day of *May* laſt, and "forwarded the ſame to his ſaid correſpondent, and "who, he believes, duly received the ſame; and he "further made oath, that he hath been informed, "and believes, that on account of various impedi-"ments impoſed by the enemy to a trade with this "country, the ſaid *Pruſſian* veſſel, *Minerva*, could "not obtain a *French* licence, and without ſuch licence "was not permitted to take on board the ſaid cargo "for this country." Now, it could be no ſecret that the enemy diſcouraged, as much as poſſible, all intercourſe with *Great Britain*, and that no veſſel would be allowed to clear out from the *Texel*, which openly avowed a deſtination to the ports of this kingdom. Mr. *Clark* further ſays, "that *Daniſh* veſſels were "allowed by the *French* laws to trade from *France* or "*Holland* to ports of their own country, and in con-"ſequence thereof, his ſaid correſpondent engaged the "ſaid *Daniſh* ſhip, *Dankbaarheit*, to take on board "the ſaid cargo of cheeſe, being, as he verily believes, "the identical cargo ſo as aforeſaid intended to have "been ſhipped on board the ſaid *Pruſſian* veſſel, "*Minerva*, and to convey the ſame to *Leith* under "the protection of His Majeſty's aforeſaid licence; "and, in order effectually to deceive the enemy, "obtained a ſimulated clearance for *Fahrſund*." Why, that does not apply to this ſhip in particular. The *Pruſſian* veſſel might have cleared out for a port of her own country, as well as the *Daniſh* veſſel. It could

The DANKBAARHEIT.

November 6th, 1812.

could have been no more a matter of difficulty with one ſhip than with the other to obtain an exit: in this manner, either of them might, with equal facility, have taken a falſe clearance. The neceſſity, therefore, which is held forth, of employing a *Daniſh* veſſel, by no means ſatisfies the judgment of the Court. The account given in this affidavit confirms me in the opinion which I had formed, that there was no ſuch ſhip as the *Pruſſian* ſhip, the *Minerva*; and that the repreſentation which has been made reſpecting this tranſaction, is, from the beginning, a factitious and fabricated hiſtory. The diſguiſe, too, it muſt be obſerved, is continued longer than was neceſſary for the purpoſe of impoſing upon the enemy, and in a quarter where it was not at any time neceſſary for ſuch a purpoſe. It is endorſed upon the licence, which was not to meet the eye of the enemy: it could not, therefore, have been intended as a fraud upon the *French* government, but upon this country. The ſcheme was, I am perſuaded, to extricate the ſhip from its confinement, under this diſguiſe, in order to get her back in ſafety to the port of her owners. I think, therefore, that there has been a fraudulent application of the licence to this veſſel; that the intention of the parties was fraudulent from the beginning, when Mr. *Clark* was originally directed by his correſpondent at *Amſterdam* to apply to the Privy Council for this licence. Mr. *Smelt* does every thing in his power to perſuade the Government of this country, that a *Pruſſian* ſhip was employed in the conveyance of this cargo. He makes no diſcloſure as to any difficulties that had ariſen with reſpect to the execution of the original plan, and of the neceſſity of purſuing another courſe; but appearances

were

The DANKBAARHEIT.

November 6th, 1812.

were to be held out as of a *Pruſſian* ſhip, when ſhe arrived in this country. I have no heſitation in pronouncing the liability of this ſhip to condemnation.

With reſpect to the other part of the queſtion, in what manner the proprietors of the cargo ſhall be affected by the concluſion at which the Court has arrived: that muſt depend upon how far they are implicated in the fraud which has been practiſed. Now, there certainly is very ſtrong reaſon to ſuppoſe, that the cargo belongs to merchants at *Amſterdam*; for *Clark* ſays, that he received inſtructions from his correſpondent at *Amſterdam* to apply for the licence. Who is the contriver and manager of this fraud? Why, Mr. *Smelt*, of *Amſterdam*. What ſays the maſter in his depoſitions? To the 27th interrogatory he ſays, "that the manifeſts and bills of lading of the ſaid "ſhip's cargo, which were found on board, were "delivered to this deponent by Mr. *Smelt*, *the lader* "*of part of the ſaid ſhip's cargo at Amſterdam*, to be "made uſe of as belonging to the ſaid ſhip, but which "were, as this deponent believes, belonging to, or "procured for, ſome other veſſel." The whole contrivance, then, and ſcheme of this tranſaction, originates at *Amſterdam*; and the probability is, that the cargo is the property of merchants reſident in that place. At the ſame time it is poſſible, that there may be *Engliſh* intereſts engaged in this ſpeculation. That the property belongs to ſubjects of the enemy, is not fully and concluſively eſtabliſhed: it is matter of ſtrong ſuſpicion only, and the fact may turn out to be otherwiſe. I am not willing to exclude the parties from an opportunity of ſhewing this to be the caſe, and that they were not privy to the fraudulent ſubſtitution of this *Daniſh* ſhip for the *Pruſſian* ſhip deſignated in the licence.

The DANKBAARHEIT.

November 6th, 1812.

licence. If theſe facts ſhall be proved to the ſatisfaction of the Court, I will give them the benefit of that very favourable rule upon which this Court has been in the habit of acting; that where the enemy's ſhipper has been guilty of a fraud, the intereſts of the *Britiſh* merchants, not parties to the fraud, ſhall not be affected. Upon theſe grounds I now pronounce the condemnation of the ſhip and the freight, but direct the caſe to ſtand over as to the cargo.

December 9th, 1812.

CHARLOTTE CAROLINE, ADER.

Salvage, right of, on recapture, not extinguiſhed by ſubſequent capture and condemnation in an enemy's port, where the ſentence condemning the property is over-ruled by an order of releaſe from the ſovereign power of the ſtate.

THIS ſhip, under *Swediſh* colours, laden with a cargo of iron and deals, on a voyage from *Stockholm* to *Dublin*, in the month of *June* 1810, was boarded off *Moen Iſland*, in the *Baltic*, by a *Daniſh* row-boat, and afterwards by His Majeſty's cutter *Cheerful*, Lieutenant *George Wood* commander, and placed under the protection of the convoy from *Darshead* to *England*, the maſter being put in poſſeſſion of his ſhip on granting a certificate, that ſhe had been recaptured from the *Danes* by the *Cheerful*. The ſhip did not arrive at *Dublin*, the port of her deſtination, till the month of *November* 1811, having, in the mean time, been captured a ſecond time by the *Danes*, and carried into *Copenhagen*, where the veſſel and cargo had been condemned for ſailing under *Britiſh* convoy, but were ſubſequently reſtored by an order from the king of *Denmark*.

JUDGMENT.

JUDGMENT.

The CHARLOTTE CAROLINE.

December 9th, 1812.

Sir *W. Scott*.—This caſe ariſes upon the aſſerted capture and recapture of this *Swediſh* ſhip and cargo, and the queſtion to be decided, in the firſt place, is, whether any right to ſalvage has been acquired; and ſecondly, whether, if acquired, it has not been diſcharged by circumſtances which have ſince occurred.

The ſuit commenced by the arreſt of the ſhip at *Dublin* long after the facts happened; it appearing that the veſſel which effected the recapture, if it was a recapture, had quitted poſſeſſion, and ſuffered her to proceed on her voyage. No depoſitions were taken, (nor indeed could they, under the circumſtances, have been taken), but an affidavit was made by the acting maſter of His Majeſty's ſhip the *Cheerful*, wherein he depoſes, "that about half-paſt ſeven o'clock "in the morning of the 25th day of *June* 1810, the "ſaid cutter, *Cheerful*, being on a cruize off *Moen* "*Iſland*, in the *Baltic*, a brig was obſerved at a con- "ſiderable diſtance, under *Swediſh* colours, and a "*Daniſh* row-boat in the act of boarding her; that "all ſail was immediately ſet on the *Cheerful* in chace, "and the weather being then calm, the ſweeps were "all manned, and all ſail being likewiſe ſet on the "ſaid brig, in order to eſcape, two of the *Cheerful's* "boats were, about eight o'clock, manned and armed, "and ſent in chace of the ſaid brig, under the com- "mand of the deponent; that about half-paſt twelve "the boats arriving within piſtol ſhot, commenced "firing, upon which the row-boat puſhed off, and "made her eſcape, carrying with her the men ſhe "had put on board the ſaid brig, and the deponent, "on boarding the brig, found two piſtols and four "cutlaſſes on the gang-way, which the enemy had

The CHARLOTTE CAROLINE.

December 9th, 1812.

" left behind; and the deponent further ſaith, that, " on examining the papers of the ſaid brig, he found " ſhe was called the *Charlotte Caroline*, *J. N. Arden* " maſter, on a voyage from *Stockholm* to *Dublin*, with " a cargo of iron and deals; that the deponent then " carried her down to the *Cheerful*, and took the " maſter on board, with his papers, where a copy of " the manifeſt was taken, and the ſaid maſter granting " a certificate reſpecting the capture and recapture of " the ſaid brig, he was again put in poſſeſſion of her, " and the *Cheerful* convoyed her that ſame evening " to *Dars-head*, where ſhe joined the convoy juſt then " proceeding to *England*." The certificate granted by the *Swediſh* maſter with reſpect to the capture and recapture of this brig, is in theſe terms:—" Theſe are " to certify, that the brig *Charlotte Caroline*, under " my command, was captured by a *Daniſh* privateer " off *Moen Iſland*, at 7. 30. A.M. of this date, and " detained by the ſaid privateer till 12. 30. P.M. of " the ſame date, when ſhe was recaptured by the " boats of His *Britannic* Majeſty's cutter, *Cheerful*, " Lieutenant *George Wood* commander." This certificate is in the *Engliſh* language, and is ſigned by the maſter himſelf. Now this is *prima facie* evidence of a recapture. It contains a direct acknowledgment, that the abandonment of this veſſel by the enemy, was occaſioned through the terror of approaching force, and, unleſs the inſtrument be in any way falſified, is quite ſufficient to conſtitute a caſe of recapture. At the bottom of this document is a paſſage written, I preſume, in the *Swediſh* language, not in direct terms contradicting the facts to which the maſter had put his ſignature, or aſſerting that the certificate of recapture was ſigned by compulſion, but merely ſtating,

The CHARLOTTE CAROLINE.

December 9th, 1812.

that the *Daniſh* privateer inſpected the papers, and then left the ſhip; and that the *Engliſh* cutter came and convoyed her. The maſter made a proteſt, in which he aſſerts, that "he was obliged to ſign a document." Now I muſt ſay, that, in my opinion, it is much to the diſadvantage of that proteſt, that it was not made immediately on his arrival at a port in *Denmark*. If the maſter had any complaint to make, of being compelled to ſign and leave ſuch a paper with the *Engliſh* officer, it was his duty to have taken the firſt opportunity of putting the facts upon record. But it is not till after his arrival at *Dublin*, and, I preſume, not until this demand of ſalvage was made, that he thought proper to make this proteſt, ſtating compulſion to have been uſed. The maſter could not be ignorant of the contents of the certificate which he had ſigned off the iſland of *Moen*; for it appears, that he has a knowledge of the *Engliſh* language, having made his affidavit of the 8th of *January* laſt, without the aid of an interpreter. The account given in the proteſt is, that he was proceeding from *Stockholm* to *Dublin* with a cargo of iron and deals, and that "nothing material "occurred until the 24th, on which day, having got "in between *Herens* and *Copenhagen*, with the wind "at S.W., he was hailed by His *Britannic* Majeſty's "ſhip *Standard*, of 74 guns, ſtationed off the *Sound*, "and immediately after a boat from that ſhip was ſent "alongſide, the officer on board of which ſaid, that "the appearer ſhould not paſs the *Sound* with his "veſſel; in conſequence of which, he, the appearer, "proceeded on board the ſaid ſhip, to know the rea"ſon why he was prevented from paſſing the *Sound*, "and at the ſame time requeſting permiſſion to do ſo, "conceiving that he was entitled to do ſo, as belong-

The CHARLOTTE CAROLINE.

December 9th, 1812.

" ing to the *Swediſh* nation, and a neutral veſſel per-
" mitted to carry the produce of his nation to *Great*
" *Britain*; to which the appearer was replied by the
" commander of the ſaid ſhip, *Standard*, to know his
" (the appearer's) reaſon why he did not take the be-
" nefit of the *Engliſh* convoy, which other veſſels ſail-
" ing from the *Baltic* at the time had done; to which
" the appearer returned for anſwer, that as his veſ-
" ſel belonged to a free nation, he was not in the
" leaſt dread of being taken by the *Danes*, and that
" he therefore did not think it neceſſary, in conſe-
" quence of ſuch his neutrality, to go under an
" *Engliſh* convoy; and more ſo, as all his papers and
" clearances for his veſſel and cargo were made out
" for *Dublin*, his port of deſtination, and that he
" would not break his neutrality for any convoy;
" and therefore conceived, that he ſhould not meet
" with any interruption in paſſing the *Sound*, block-
" aded as it then was by the *Engliſh* veſſels; but
" notwithſtanding this, the commander of the ſaid
" ſhip, *Standard*, told the appearer, that if he had
" been ſpeaking to him on the ſubject for a twelve-
" month, he would not let the veſſel paſs the *Sound*;
" and that he the appearer muſt ſail with her through
" the Belt: and immediately after the lieutenant of
" the ſaid ſhip *Standard* wrote on the appearer's ſhip
" paſs, that the veſſel ſhould not on any account be
" allowed to paſs the *Sound*, but muſt ſail through
" the *Belt*; the appearer was, therefore, obliged to
" proceed on board his veſſel, and ſhortly after he
" made ſail towards the *Great Belt*." Now, I cer-
tainly think the *Britiſh* officer had a perfect right to
direct this man to proceed under convoy, ſince the
Daniſh Government had at that time iſſued an ordi-

The CHARLOTTE CAROLINE.

December 9th, 1814.

nance, adopting the *French* decrees, by which all veſſels coming to this country, as this ſhip unqueſtionably was, would be liable to capture and condemnation. Does the maſter appear to have ſubmitted quietly to the direction given him by the *Britiſh* officer? Quite the contrary. He fought as ſturdy a battle as he could, and contended ſtrenuouſly that he had a right, as a neútral, to paſs the Sound without convoy. He is, therefore, by his own deſcription of himſelf in that ſituation, a man not likely to have been induced through fear to ſign a falſe certificate as to the capture and recapture of his veſſel. He is obliged to go through the *Belt*, he ſays, and, " in paſſing through, " a *Daniſh* privateer's boat, in which were eleven " men, came on board, and after overhauling and " examining the ſhip and her papers, and in the courſe " of ſuch examination finding that the *Standard* would " not let him paſs through the Sound, as is herein- " before ſtated, they left him." So that, according to him, theſe *Daniſh* boats came up, and having ſatisfied their curioſity by inſpecting his papers, permitted him to go on. Now this is a moſt improbable circumſtance to have occurred. The *Daniſh* order, prohibiting all trade and intercourſe with this country, was in full force, and the papers on board this ſhip, which it appears were inſpected by the *Danes*, held out an avowed deſtination to this country. I profeſs that I cannot ſee on what grounds theſe *Daniſh* captors can be ſuppoſed to have relinquiſhed the poſſeſſion of this veſſel. It is hardly credible that they ſhould have acted with this unneceſſary degree of forbearance; and their motive for ſo doing is not accounted for in a manner which at all ſatisfies the judgment of the Court. He goes on to ſay, that " in about

The CHARLOTTE CAROLINE.

December 9th, 1814.

"three hours after, two boats from an *Engliſh* cutter "came alongſide, and ordered the appearer to proceed "on board the ſaid cutter immediately, with all his "papers, which he complied with; and being aſked "by the ſaid commander what boat that was that "boarded him this morning, this appearer informed "him, that it was a *Daniſh* privateer of eleven men, "and that in the examination of his papers, finding "that the veſſel was a real *Swede*, and a *Swediſh* cargo "on board, and the commander of ſuch *Daniſh* pri- "vateer having ſeen that he was aware that the *Stan-* "*dard* would not allow him to paſs through the "*Sound*, he allowed him to proceed: that "the "lieutenant of the *Engliſh* cutter then informed him, "that he would bring him to the *Engliſh* convoy; "but the appearer declared that he would not ſail "under convoy, as that would be the cauſe of break- "ing through his neutrality, and alſo, if he was ſeen "by a *Daniſh* privateer under an *Engliſh* convoy, and "if it ſhould ſo unfortunately happen that he ſhould "be taken by the *Danes*, both the veſſel and cargo "would moſt certainly be condemned: that the ſaid "lieutenant then proceeded to copy ſeveral of the "appearer's papers in his preſence, in the cabin; and "while he had been in the act of doing ſo, he ordered "a tow-line to be made faſt from the cutter to the "appearer's veſſel, and unknown to the appearer, "who was ſtill in the cabin with the lieutenant; he, "on the evening of that day, on coming on deck, "found his veſſel cloſe in with the *Engliſh* convoy, "and after being *obliged* to ſign a document." So that, according to the ſtatement here made, this perſon, who had refuſed to join convoy, and had ſtood out againſt what was very properly required of him,

now

The CHARLOTTE CAROLINE.

December 9th, 1812.

now ſubmits without oppoſition, and ſigns a certificate which, according to his preſent account, is utterly falſe and unfounded. In his ſecond affidavit I obſerve he ſays that he was *deſired*, not that he was *compelled* to ſign the inſtrument.

The account given by the two *Engliſh* officers, who are, to be ſure, intereſted perſons, but not ſo much intereſted as this *Swediſh* maſter, repreſents the tranſaction in a very different light. They ſay, that the *Danes* had taken poſſeſſion of this veſſel, had altered her courſe, and were towing her with an evident intention to carry her towards the ſhore, under a *Daniſh* battery; and when the boats of the *Cheerful* came up and commenced firing, quitted with ſuch precipitation as to leave ſome of their arms behind them. Now, which of theſe two accounts is to be believed? I am of opinion, that the *Engliſh* account is the moſt entitled to credit. The other is, in itſelf, highly improbable; but that given by the *Britiſh* officers is very natural, and is confirmed by the documents ſigned by the *Swediſh* maſter himſelf: unleſs, then, I can believe that this man was compelled to ſign this paper, which, judging from his conduct in the former part of this tranſaction, is not very likely to have happened, I muſt ſay, that the caſe on behalf of the recaptors is ſupported by a preponderance of evidence, as well as by greater probability in the circumſtances.

The ſecond queſtion is, whether any thing has ſince occurred to deprive the recaptors of the right which, by their ſervices, they had acquired. It has been contended very ſtrongly, that the ſubſequent act of capture and condemnation, by the *Danes*, worked a converſion of the property, and conſequently a defeazance of the right of the ſalvors. Now it is certainly true that the right of the recaptors to ſalvage, is extin-

The CHARLOTTE CAROLINE.

December 9th, 1812.

guiſhed by a regular ſentence of condemnation, carried into execution, and diveſting the owners of their property. But, in the preſent caſe, no ſuch effect has been produced. You cannot here reſort to the legal fiction of converſion, becauſe the ſentence of the Prize Courts was, in this caſe, over-ruled by an order of releaſe from the ſovereign power of the ſtate. The ſhip, it appears, was proceeded againſt, and condemned, for having ſailed under *Britiſh* convoy; and there being a *Daniſh* ordinance, expreſsly prohibiting all veſſels from navigating under the protection of *Britiſh* ſhips of war, it was unneceſſary to look out for any further ground of condemnation. If ſuch had been wanting, the deſtination to a *Britiſh* port would have been ſufficient for the purpoſe. She is condemned, however, upon the former ground only; and from this ſentence an appeal is proſecuted before a ſuperior Court, by which the ſentence of condemnation is confirmed; but, upon application to the royal authority, the property is reſtored, and the maſter is again put into the poſſeſſion of his ſhip. The ſentences, then, of the Prize Court, are aboliſhed, by an authority which, according to the conſtitution of that country, is perfectly competent to do ſuch an act; and the legal fiction of converſion is completely done away by the fact of reſtitution. The maſter is redintegrated in his rights, and the veſſel ſails to this country exactly in the ſame ſtate as if ſhe had proceeded on her original voyage, and had ſuffered no interruption from the *Daniſh* cruizer.

Upon theſe grounds I am of opinion, in the firſt place, that the act of recapture, by His Majeſty's cutter the *Cheerful*, is ſufficiently eſtabliſhed, and ſecondly, that nothing has ſince occurred to defeat the right of the recaptors to ſalvage.

RHADAMANTHE, MAYER.

January 29th, 1813.

THIS was the caſe of a ſhip, which, in the proſecution of a voyage from *Malta* to *London*, ſuſtained conſiderable damage, and was compelled to put into *Port Mahon*, where ſhe underwent repairs, the payment of which was advanced by a merchant of that place, to whom the maſter granted a bottomree-bond on the ſhip and freight, to the amount of £804, including intereſt at the rate of 28 per cent. The ſhip then proceeded on her voyage, but in conſequence of the tempeſtuous ſtate of the weather, was under the neceſſity of entering the port of *Cork*, where ſhe was again repaired, the money being advanced by Meſſrs. *Goin* and *Fennel*, of that place, who obtained from the maſter two bonds for £2,207. on the ſhip, freight, and cargo, but more particularly binding the ſhip and freight.

Bottomree bonds of a later date are entitled to priority of payment over thoſe of a former; but this privilege is confined to bonds given under the preſſure of neceſſity in a foreign port, where the maſter and owners have no perſonal credit, and no other means of procuring ſupplies for the repair of the ſhip.

The ſeveral bonds were now put in ſuit; the validity of that which was entered into at *Port Mahon* was not denied; but it was prayed on the part of the holder of it, that as the ſhip and freight would not be ſufficient to diſcharge all the bonds, thoſe which were granted at *Cork* might be ſo far paid from the cargo, as to leave ſufficient of the proceeds of the ſhip and freight to ſatisfy the demands of the firſt bond, by which the ſhip and freight only were hypothecated.

On the part of the owners of the cargo this mode of proceeding was objected to, becauſe it would make them indirectly liable to the payment of the firſt bond, which was never intended to affect the cargo.

Objections

The Rhadamanthe.

January 29th, 1813.

Objections were likewiſe taken on their behalf to the validity of the ſecond bonds granted at *Cork*, upon ſeveral grounds.

Firſt, it was ſaid—That the pretended hypothecation took place not in a foreign port, but in a port of the United Kingdom, where the maſter might have correſponded with the owners, and was therefore not in the nature of bottomree.

Secondly—That it was not ſhewn that any demand for payment had been made on the owners of the ſhip and cargo, who were *perſonally* reſponſible.

Thirdly—That it was not a bottomree tranſaction, becauſe the money was advanced by *Goin* and *Fennel*, not on the credit of the property only, but likewiſe on the credit of *Brandram* and Co. part-owners of the cargo, for whom they acted in the capacity of agents.

Fourthly—That the demand of the obligees had been actually ſatisfied, *Goin* and *Fennel* having drawn bills upon the houſe of *Brandram* and Co. which had been duly paid.

Fifthly—That the maſter's power to hypothecate was not a general power, and that his exerciſe of it was not warranted under the circumſtances of the preſent caſe.

Sixthly—That *Brandram* and Co. could only bind themſelves, and not the other owners.

Seventhly—That inſurance was charged, and conſequently there was no maritime riſque.

Laſtly—That if the bonds granted at *Cork* are good and valid bonds, recourſe muſt be had for the payment of them in the firſt inſtance to the ſhip and freight, which were more particularly hypothecated.

JUDGMENT.

JUDGMENT.

The Rhadamanthe. January 29th, 1813.

Sir *W. Scott.*—This is the caſe of a ſhip which was bound on a voyage from *Malta* to *London*, and put into *Port Mahon* in diſtreſs, where the maſter, having no credit, hypothecated the ſhip and freight, as he had an unqueſtionable right to do. The bond given by the maſter for money advanced, under ſuch circumſtances, is clearly of the nature of bottomree, and is upon that account entitled to a very favourable conſideration. Such bonds have always been upheld by this Court with a very high hand, and it would be very detrimental to the intereſts of the commercial world if they were not ſo upheld. The juriſdiction of the Court over the ſubject-matter of theſe bonds has been allowed by the courts of common law, upon various occaſions, although they are here viewed in a light very different from that in which bonds of other deſcriptions are conſidered in thoſe courts. In the caſe of *Johnſon* verſus *Shippen*, the juriſdiction of the Court of Admiralty was expreſsly acknowledged. That was a caſe in which "a ſhip put into *Boſton*, in *New England*, "and there the maſter took up neceſſaries, and gave "a bill of ſale, by way of hypothecation, and now "there being a ſuit againſt the ſhip and owners to "compel repayment, a prohibition was moved for, "and the Court held, that the maſter could not by "his contract make the owners perſonally liable to a "ſuit, and therefore as to them granted a prohibition; "but as to the ſuit againſt the ſhip, denied a prohi-"bition, for the maſter can have no credit abroad but "upon giving ſecurity by hypothecation, and it is not "reaſonable we ſhould hinder the Court of Admiralty "to give a remedy where we can give none ourſelves." 1 Salkeld, 35.

In the ſame caſe, as reported by Lord *Raymond*, Vol. 2. 983.

Mr. Juſtice

The Rhadamanthe.

January 29th, 1813.

Mr. Juſtice *Powel* is repreſented to have ſaid—"The "original matter is cognizable in that court, (the "Court of Admiralty), and the hypothecation upon "land is of neceſſity; for it muſt be done in port, "and cannot be done at ſea, and the party has no "remedy but at maritime law." Such is the foundation on which theſe bonds ſtand. They are conſidered valid upon the ground of neceſſity only, and it is upon the ſame principle of neceſſity that a later bond is entitled to priority of payment over a former. This courſe of payment is indeed directly contrary to what takes place in the caſe of common bonds, where thoſe of a ſubſequent date can only be enforced after all demands upon former bonds ſhall have been firſt paid and ſatisfied. In this ſpecies of ſecurity, which is entered into under the preſſure of neceſſity, the order of payment is very properly reverſed, ſince, without the ſubſidiary aid of a later bond, the property would be totally loſt, both to the owners and the former bond-holders. But this privilege is confined to bonds given under this ſpecies of neceſſity in a foreign port, where the maſter and owners have no perſonal credit, and no other means of procuring the neceſſary ſupplies for the repair of the ſhip. It by no means follows that the ſame privilege is to be extended to every ſpecies of ſecurity which may affect the ſhip.

It appears that this veſſel, in the proſecution of her voyage, after this firſt bond of unqueſtionable authority had been entered into, was, in conſequence of ſome damage ſhe had ſuſtained, obliged to put into the port of *Cork*. Whether *Cork* is to be conſidered a domeſtic or a foreign port, may admit of ſome degree of doubt. It is true that this Court has decided, but not without conſiderable heſitation, that, for ſome purpoſes, the ports

The Rhadamanthe.

January 29th, 1813.

ports of *Ireland* are to be considered as foreign ports; but the question respecting the jurisdiction of the Court over the subject matter of domestic bonds, was left untouched, by the decision of the Court in that case. The case which has been cited from Lord *Raymond*, shews that the common law allows the jurisdiction of the Court of Admiralty upon the ground of necessity only; but the reasoning there stated would rather lead to the conclusion, that this Court is vested with the power of enforcing such bonds, since there is, I presume, no possibility of proceeding upon them elsewhere except by an action of trover, or some such indirect remedy; a remedy which divests the real security, and throws the obligee off to the personal responsibility of a party who may possibly be insolvent. In the case of *Justin* versus *Ballam*, a prohibition was granted, *first*, because it did not appear that the ship was *in her voyage* when she became in distress for want of an anchor, &c. and at the time of the contract; and, *secondly*, because there was no hypothecation; from whence it seems probable, that if the distress had occurred in the course of a voyage, and there had been an actual hypothecation, a consultation might have been awarded. There are cases of later date that appear to limit more strictly the jurisdiction of the Court; but it is not on the present occasion necessary to go through the particulars of them for the purpose of ascertaining the exact state of the law upon this general point.

2 Ld. Raym.

It has been already determined in this Court, that the ports of *Ireland* are, for the purposes of hypothecation, to be considered as *foreign* ports; and nothing has occurred to alter the opinion of the Court, or to induce it to depart from the rule laid down in a former case,

The Rhadamanthe.

January 29th, 1813.

caſe, except the incorporation of *Ireland* with this country by union. I do not know that that circumſtance would neceſſarily have the effect of producing any material diſtinction; but I forbear to give a decided opinion upon the point, ſince the caſe does not require it. The preſent caſe turns upon the queſtion, whether the ſecond bonds, given at *Cork*, are of that privileged kind to which the Court ought to aſſign precedence, and I am of opinion that they are not. They are, indeed, maritime bonds, but not of that high ſpecies with the former bond granted at *Port Mahon*. They do not, as that did, ariſe out of the deſtitute ſituation of the maſter in a foreign port, unable to obtain the neceſſary ſupplies for his veſſel on the perſonal credit of himſelf or his employers. The very purpoſe for which bottomree bonds were created was, the protection of the foreign merchant advancing the money, who is ſuppoſed to be an entire ſtranger to the owners of the ſhip and cargo, and to have no means of judging of their ſolvency. With them he has no privity, and has nothing to look to for his ſecurity but the viſible property of the ſhip in the place of his reſidence.

Taking the ports of *Ireland* to be *foreign* ports, what has been the courſe of the preſent tranſaction? Was the money, in point of fact, advanced upon the ſecurity of the ſhip, freight, and cargo only, and not upon the credit of the owners? It is ſworn that the maſter wrote "to *Brandram* and *Templeman*, requeſting to "be furniſhed with money to pay for the repairs of "the ſaid ſhip, and that Meſſrs. *Brandram* and *Tem-* "*pleman*, in conſequence of ſuch application, opened "a credit with Meſſrs. *Goin* and *Fennel* of the city of "*Cork*, merchants, and gave them directions to ad-

"vance

The Rhadamanthe.

January 29th, 1813.

"vance ſuch ſum of money to the ſaid maſter as "ſhould be requiſite to repair the ſaid ſhip and to fur- "niſh her with neceſſaries to proceed on her voyage "to *London*; and that the ſaid Meſſrs. *Goin* and *Fennel* "accordingly advanced certain ſums of money to the "ſaid maſter, and took two ſeveral bonds of bottom- "ree on the ſaid ſhip, cargo, and freight, which ſaid "bonds of bottomree they the ſaid *Goin* and *Fennel* "indorſed over to the ſaid Meſſrs. *Brandram* and *Tem-* "*pleman*, and drew on them the ſaid *Brandram* and "*Templeman* bills of exchange for the amount of the "monies they the ſaid *Goin* and *Fennel* had ſo advanced "to the ſaid maſter."

This ſtatement has not been contradicted; and it would have been moſt important to the parties to have negatived the fact, if they had it in their power to ſo do. It is, I think, clearly eſtabliſhed, that the money was advanced by *Goin* and *Fennel*, not with a view to any credit on the ſhip, but on the credit of *Brandram* and Co., their employers in *London*; and it is upon this credit that the whole tranſaction moves. *Goin* and *Fennel* advanced the money purely upon the credit of *Brandram* and *Templeman*, and may recover againſt them at common law, if they are not indemnified by payment already made; but the truth is, as aſſerted in the affidavit, that they have actually received the money. It cannot be ſaid that they had no remedy except in the Court of Admiralty: they had a demand on the perſonal credit of *Brandram* and *Templeman*. I am clear, therefore, that theſe later bonds are perſonal tranſactions only, and not of that high ſpecies that would defeat the rights of the foreign merchant, who ſtood forward at *Port Mahon*, and put the ſhip in motion at his own expence, without looking to the perſonal

The Rhadamanthe.

January 29th, 1813.

perſonal reſponſibility of the owners. The conduct of the maſter throughout the tranſaction, as well as that of *Brandram* and *Templeman*, has been proper enough. He conſulted them as the principal owners of the cargo, and they expreſſed a wiſh that he ſhould rather bring it on to *London*, the port of deſtination, than ſell it at *Cork*. In giving theſe directions, Meſſrs. *Brandram* and *Templeman* muſt be conſidered as acting for themſelves and the other owners; nor was it to be expected that they ſhould have recourſe to all the different owners of the different parcels of the goods. If they acted prudentially for themſelves and their own ſhare of the cargo, it muſt be preſumed that it was likewiſe for the benefit of all the other owners, to bring the goods on to the port of deſtination. They have a fair claim, in point of juſtice, for contribution from the other parties, who ſupport the preſumption of law by adopting what has been done for them. They do not even pretend that they wiſh matters to have been otherwiſe conducted, nor do they deny the propriety of the courſe that has been purſued; and this, I think, is going very far towards adopting it as their own. If they take their reſpective ſhares of the cargo, they muſt undoubtedly take them ſubject to a fair proportion of the burthen which has been incurred. Supposing that any doubt could be raiſed with reſpect to the juriſdiction of the Court, what muſt be the conſequence but that, wherever the caſe was carried, the proprietors of the ſmaller portions of the cargo would be compelled ſomehow or other to contribute in the way of average, which would bring the matter ſubſtantially to the ſame concluſion. I ſhall therefore pronounce for the validity of the bottomree bond granted at *Mahon*; and that the ſaid ſhip and freight

are

are in the firſt place liable for the payment of the ſaid bond; and that the remainder of the proceeds of the ſhip and freight, ſo far as the ſame will extend, is anſwerable for the payment and ſatisfaction of the bonds granted at *Cork* on the ſhip, cargo, and freight; and that ſo much of the ſaid laſt-mentioned bonds as ſhall remain unſatisfied from the ſhip and freight, ſhall be made good by the ſeveral owners of the cargo rateably. I ſhall alſo decree a monition againſt the ſeveral owners of the cargo, to bring in their proportions of freight and accounts of the value of their goods.

The Rhadamanthe, January 29th, 1813.

ANNA MARIA, WOLGAHAYER.

January 29th, 1813.

THIS was the caſe of a *Daniſh* ſhip, laden with a cargo of corn and timber, and captured on a voyage from *Copenhagen* to *London*. A licence had been procured for this veſſel, permitting her to come from the *Baltic* to the port of *London*, on condition that ſhe ſhould proceed from her port of lading to *Leith*, there to take convoy. The veſſel had not gone to *Leith*, as required by the licence, but had put herſelf under the protection of *Britiſh* convoy at *Wingo Sound*, having obtained a paſſport from the *Britiſh* admiral on the *Baltic* ſtation, permitting her ſo to do, and was proceeding from thence *direct* to the port of *London*. The queſtion therefore was, whether this paſſport from the *Britiſh* admiral would juſtify a deviation from the condition of the licence requiring the veſſel to touch at *Leith*.

A paſſport from the *Britiſh* admiral, permitting a veſſel to come *direct* to the port of *London*, will juſtify a departure from the terms of a licence requiring her to touch at *Leith*, there to take convoy.

The ANNA MARIA.

January 29th, 1813.

JUDGMENT.

Sir *W. Scott.*—This ſhip is aſſerted to have been coming under licence with articles of the firſt importance for the ſupply of this country. A *Britiſh* merchant, who ſtates himſelf to be the conſignee of the cargo, ſteps forward to ſupport the claim, and there is nothing in the place of capture which can lead to any ſuſpicion of a falſe deſtination. The caſe therefore preſents itſelf to the notice of the Court under circumſtances very favourable to the good faith of the claimants; and I ſhould, upon that account, feel a ſtrong diſpoſition to uphold the tranſaction. But there may be groſs errors, from the effect of which the Court can afford no relief. Thoſe conditions of the licence which the government of the country has, on grounds of public policy, thought to be material, muſt be ſtrictly complied with; all ſuch conditions it is the duty of the Court to ſuſtain. Now nothing can be more imperative than the terms of this licence, requiring that the veſſel ſhould come direct to *Leith*, there to take convoy; and if there were nothing elſe in the caſe, the Court would, I fear, be under the neceſſity of proceeding to a ſentence of condemnation. The maſter has no right to aſſume to himſelf a diſcretion of going elſewhere; his path is clearly chalked out in the licence, and he is not at liberty to deviate from it upon his own ideas of expediency. It is not a conſideration of obtaining protection for a longer portion of the voyage which can juſtify him in departing from the courſe which has been deemed proper by His Majeſty's government. But if the *Britiſh* admiral has been in the habit of directing ſhips to proceed to *Wingo Sound* for the purpoſe of taking convoy, it would, I think, be a harſh meaſure to ſay that the property of perſons acting

The ANNA MARIA.

January 29th, 1813.

under the ſanction of ſuch inſtructions, ſhould be liable to condemnation. It is natural that foreign maſters ſhould feel themſelves protected by a practice founded on ſuch authority. Looking at the licence with the eye of a lawyer, I confeſs that I ſhould differ from Sir *James Saumarez* in the conſtruction which he has put upon it. It is the ſafeſt way to adhere cloſely to the directions contained in the act of the Government, and not to vary from them upon notions of greater or leſs conveniency. But, if it has been the practice of the *Britiſh* admiral to direct ſhips to go to *Wingo Sound*, *That* may afford a ſufficient juſtification to the parties purſuing ſuch a courſe. Taking the fact to be as repreſented by the claimants, I think the ſhip and cargo would be entitled to protection. As Sir *James Saumarez* is now in this town, I think it would be proper to make enquiries of him, whether he can be certain that he did not give ſuch an order. The Court would, in a caſe of this kind, think itſelf under an obligation to uphold the acts of the *Britiſh* admiral.

March 9th, 1813.

On a ſubſequent day a certificate from Sir *James Saumarez* was produced, ſtating his belief that the account given by the claimants was correct.——Ship and cargo reſtored.

February 12th, 1813.

CHARLOTTE, AVERY.

A party who, by the intervention of hoſtilities, becomes an alien enemy, is not at liberty to proſecute an appeal in the courts of this country.

THIS veſſel, under *American* colours, took on board, at *Providence*, in *Rhode Iſland*, a cargo of proviſions and other goods, with which ſhe ſailed bound to *Grenada*, and arrived at the port of *St. George*, in that iſland, on the 16th of *April* 1809. On the 19th of the ſame month the veſſel was ſeized by Lieutenant *Middleton*, repreſenting himſelf to be the commander of His Majeſty's priſon ſhip *Antigua*, and was by him proceeded againſt for a breach of the revenue laws. On the 24th of *April* a claim was given by the maſter for the ſhip and cargo, as the property of an *American* merchant; and on the ſame day the veſſel and cargo were again ſeized by *Thomas Martin*, a ſearcher in the cuſtoms for the port of *St. George*, in the iſland of *Grenada*, on whoſe behalf an information was afterwards filed. On the 12th of *May* the cauſe came on for hearing in the Vice-Admiralty Court, when the judge pronounced the ſhip and cargo to be forfeited, but reſerved the queſtion reſpecting the rights of the informants. On the 27th of *May* the reſerved queſtion came on, when the judge diſmiſſed the information filed on behalf of Lieutenant *Middleton*, for want of legal authority to make the ſeizure on which it was founded, and adjudged the brig and cargo to be forfeited under the information filed by *Thomas Martin*, and the nett proceeds to be divided, one third to the collector for the uſe of His Majeſty, one third to the commander-in-chief of the iſland, and one third to the informant. From this ſentence an appeal was pro-

The CHARLOTTE.

February 12th, 1813.

ſecuted by the claimant, and an intervention given on behalf of Lieutenant *Middleton*. In conſequence of the war which has ſince taken place between this country and *America*, the appellant has become an alien enemy; and the queſtion which ſtood firſt for the deciſion of the Court was, whether he could, under ſuch circumſtances, be allowed to proſecute his appeal. A ſecond queſtion aroſe between the two ſeizors, and, as it was admitted that the ſeizure by Lieutenant *Middleton* was firſt in point of time, the caſe depended on his competency to make the ſeizure. It appeared that he had, in the year 1805, been appointed to the command of His Majeſty's ſhip *Antigua*, then uſed as a priſon ſhip, and that his appointment had not been revoked at the time of this ſeizure. The priſoners, however, had been removed to the non-commiſſioned veſſel the *Arethuſa*, which had been hired for their reception in conſequence of the *Arethuſa* having become unfit for the purpoſe.

JUDGMENT.

Sir *W. Scott*.—This was a ſuit originally inſtituted againſt this ſhip and cargo, for a breach of the revenue laws, in the Vice-Admiralty Court of *Grenada*, where the property was condemned to the crown and the ſeizors, in the uſual proportions. It was not a perſonal action, but a proceeding *in rem*; and the ſentence of the Court, as uſual in caſes of this kind, condemned the thing itſelf. A perſon repreſenting the owner appeared, claiming the reſtitution of the goods; and I think he has been juſtly deſcribed to have come before the Court in the character of *plaintiff*, ſince the policy of the law throws on him the duty of a plaintiff—the *onus* of making out his caſe. How far he diſcharged

The CHARLOTTE.

February 12th, 1813.

that duty in the Court below, it is impoſſible for me to ſay, ſince the proceedings are not before me. It appears, however, that his claim was rejected. He then comes before this Court as appellant, which character he had a perfect right to ſuſtain; but, unfortunately for him, the war with *America* takes place, and impoſes on him a diſability in law to carry on an action in any of the courts of this country. The ſentence of the Court below muſt be taken as right, unleſs it has been reverſed by the judgment of a ſuperior court. Has the party, who by the intervention of hoſtilities is become an alien enemy, a right to come forward in the Court of Appeal, and aſk for a reverſal of the ſentence? I am clearly of opinion that he has not. It is an univerſal diſability under which he labours, and which all courts are bound to notice. Whatever rights he might have poſſeſſed paſs to the crown. The officers of the crown might, if they had thought proper, have defended the claim; and, if they had ſucceeded in obtaining a reverſal of the ſentence, the King would have been entitled to the whole, inſtead of a proportion, of the property. But, to the party himſelf, the Court can aſſign nothing, nor has it the power of attending to his claims in any manner. It is under an obligation of ſhutting its ears againſt his complaints. The caſes which have been cited from *Dallas* by Dr. *Stoddart*, appear to be of a different kind. I have not had an opportunity of looking into them, but they appear to have been perſonal actions. It has not been much the practice, in modern times, to proceed againſt the property of enemies found in the country, but it is no where laid down as law, that an inqueſt of office might not now be had, and the property confiſcated. I remember a proceeding to that

States of Georgia v. Brailsford, &c.

The CHARLOTTE. February 12th, 1813.

that effect in the *American* war; and there can be no doubt that the law remains preciſely the ſame as it was at that time. It is ſaid, that I may ſuſpend the preſent proceedings, and give the party an opportunity of renewing his claim on the return of peace. But this is a greater privilege than an alien friend, or any other perſon, could demand from the Court. Such a ſuſpenſion would be an Act of injuſtice to the party in poſſeſſion of the ſentence; and therefore I think it incumbent on me to reject the application.

March 18th, 1813.

Judgment reſumed.

This ſhip and cargo have been condemned for a breach of the revenue laws; and the queſtion is, who ſhall be entitled to the benefit accruing from the forfeiture. It appears that two ſeizures were made, one by Mr. *Middleton*, deſcribing himſelf as lieutenant and commander of His Majeſty's ſhip *Antigua*, and the other by Mr. *Martindale*, a ſearcher in the cuſtoms, which ſeizure is admitted to have been poſterior in point of date to that made by the King's officer. There is no diſpute then reſpecting the priority of ſeizure, and the only queſtion is, upon the competency of Lieutenant *Middleton*, the firſt ſeizor; for, if he had a right to detain this ſhip and cargo, no perſon could be entitled to ſuperſede him, and defeat his claim. Now the right of making ſuch a ſeizure muſt depend upon the words of the ſeveral acts of parliament which have been paſſed relative to this ſubject; and it is impoſſible not to obſerve, that the language of the different acts has varied reſpecting the competency of parties to ſeize, and the benefit to be derived to them in conſequence of the ſeizures which

The CHARLOTTE.

March 18th, 1813.

they may be authorized to make. It ſhould appear that the firſt act paſſed for the regulation of theſe matters contemplated ſeizures made *at ſea* only.—

12 Car. 2. c. 18. "All admirals and other commanders *at ſea* of any "ſhips of war or other ſhips having commiſſion from "His Majeſty, or from His heirs and ſucceſſors, are "hereby authorized and ſtrictly required to ſeize and "*bring in* all ſuch ſhips and veſſels," &c. Under the terms of this act no ſeizures could have been made *in port* by the officers of His Majeſty's navy; but the policy ſeems to have been much varied by ſubſequent

4 G. 3. c. 15. § 49. ſtatutes. The next law paſſed upon the ſubject contains theſe expreſſions, "except ſuch ſeizures as ſhall "be made *at ſea* by the commanders or officers of "His Majeſty's ſhips or veſſels of war duly authorized "to make ſeizures." It appears, therefore, to have looked to the former ſtatute, by which the right of naval officers was confined to maritime capture. This reſtriction, it ſhould ſeem, produced ſome uneaſineſs, or created ſome doubts in practice; for, in

5 G. 3. c. 43. § 26. the very next year, an act was paſſed, which recited the laſt-mentioned ſtatute, and then proceeded in theſe terms:—"Now, to obviate any doubts that have "ariſen or may ariſe concerning the conſtruction of "the words *ſeizures made at ſea*, it is hereby further "enacted and declared, by the authority aforeſaid, "that the ſaid words, *ſeizures made at ſea*, in the ſaid "recited act of parliament, ſhall extend and be con"ſtrued to extend to all ſeizures made by the com"manders and officers of His Majeſty's ſhips or veſſels "of war, duly authorized for that purpoſe, *any where* "*at ſea, or in or upon any river, and which ſhall not* "*be actually made on ſhore* within any *Britiſh* colony "or plantation in *America*." This ſtatute, therefore, recognizes

The CHARLOTTE.

March 18th, 1813.
28 G. 3. c. 6.

recognizes or eſtabliſhes the right of King's officers to ſeize in rivers and harbours, and indeed every where but on the ſhore. The ſtill later act appears to carry the matter farther, for it contains the following clauſe: "And be it further enacted by the authority afore-"ſaid, that all and every the goods or commodities, "and all ſhips or veſſels, forfeited by this act, ſhall "and may be ſeized by the commander or com-"manders of any of His Majeſty's ſhips or veſſels of "war, or any commiſſioned warrant or petty officer "ſpecially authorized by him or them." The words of this clauſe are very general, and appear to give a very large authority to the officers of the navy. The preſent caſe, however, does not render it neceſſary for me to examine the preciſe extent of that authority.

The facts of this caſe, ſo far as it is neceſſary for me to conſider them, are theſe;—The ſhip and cargo were ſeized in the careenage of the harbour of *St. George*, in the iſland of *Grenada*, by Lieutenant *Middleton*, claiming to be commander of His Majeſty's ſhip *Antigua*. The ſeizure was effected by means of a boat; and, though it does not appear from any evidence in the cauſe to what ſhip the boat might have belonged, I think it is but fair to preſume, that it was Mr. *Middleton*'s own boat, belonging to him as the commander of His Majeſty's ſhip *Antigua*. Now, what was the ſituation of this gentleman at the time when he made this ſeizure? In the year 1805 he received orders from Admiral *Cochrane*, the commander on the *Weſt-India* ſtation, to take charge of the *Antigua*, which ſhip is deſcribed as a ſhip of war, and is borne as ſuch on the Admiralty books. Whatever might at that time have been the validity of the commiſſion thus conferred upon him by Admiral *Cochrane*, it has ſince been

The CHARLOTTE.

March 18th, 1813.

been confirmed by higher authority: as long, therefore, as he retained the appointment thus made and confirmed, no doubt can be entertained of his right to ſeize any where except on the ſhore; and the property now in queſtion was clearly water-borne at the time of ſeizure. The queſtion then is, whether his command of this ſhip had been extinguiſhed by any other appointment made by competent authority, or by any accident which had happened to the ſhip itſelf. That this gentleman had been removed to the command of another ſhip has been contended, but I think without effect. The only document which has been referred to in ſupport of this averment is, a letter addreſſed to Lieut. *Middleton* by Admiral *Cochrane*; and even that is addreſſed to him as the commander of His Majeſty's ſhip *Antigua*. The letter is in theſe terms:—"I have "received your letter of the 25th of *January*, with "a report of ſurvey of the ſtate of the priſon-ſhip "*Antigua*, under your command, in conſequence "of which I have directed Lieutenant *Whitaker*, the "reſident agent for tranſports and priſoners of war, "to hire another veſſel for ſix months certain; and, "as this veſſel will probably want ſome fitting for the "reception and ſecurity of the priſoners, you will "ſupply ſuch of the old ſtores, bulk-heads, &c. on "board the *Antigua*, as can be converted and appro-"priated for the purpoſe." It appears, then, from this letter of Admiral *Cochrane*'s, that a repreſentation had been made to him by Lieutenant *Middleton*, that the *Antigua* was no longer fit to hold the priſoners, and that in conſequence of the repreſentation ſo made to him, the admiral had directed another veſſel to be hired, and the *Arethuſa*, it ſhould ſeem, was taken up for that purpoſe. The *Antigua* had been originally a ſhip

The CHARLOTTE.

March 18th, 1813.

a ſhip of war, and had been uſed for the cuſtody of priſoners of war, as other king's ſhips frequently are; but the *Arethuſa* never had any commiſſion, nor was ſhe in any manner incorporated into the *Britiſh* navy; her ſervices were merely ſupplemental to thoſe of the *Antigua*, and could not at all deprive that ſhip of her military character. Admiral *Cochrane*, in another part of his letter, ſays, "You will repair on board (the "*Arethuſa*) with the principal part of your crew, to "take charge of her, leaving a ſufficient number to "take care of the *Antigua* till further orders, for "which purpoſe her eſtabliſhment is, for the preſent, "to be kept up." So that the eſtabliſhment of the *Antigua* was ſtill to be kept up, and Lieutenant *Middleton* was ſtill to continue legally and actually the commander of that ſhip, and alſo to have the care of this hired veſſel. There was therefore no ſuperceſſion of his authority, no ſeverance or diſſociation of the men; or, if a ſeverance, certainly no diſſociation; for they were to continue under the command of their own officers, and within ſight of their own ſhip; ſtill to be borne on its books, and to be ſubject to the articles of war.

Was the phyſical ſtate of the ſhip ſuch as neceſſarily to diſconnect the crew, and to take away the right of the commanding officer? I am of opinion that it was not. The preſent caſe is by no means like that to which it has been compared*. That was a caſe in which the ſhip had actually ſunk, and was altogether loſt at the time when the capture was made. But here the ſtate of facts is totally different. This ſhip

* The *Glouceſter*, in Admiral *Anſon*'s ſquadron, vide 6 Robinſon, 305.

was

The CHARLOTTE.

March 18th, 1813.

was in exiſtence, and though not fit for the ſervice in which ſhe had been originally employed, (the ſafe cuſtody of priſoners of war), yet ſhe was ſtill uſeful for ſome purpoſes, and was ſtill employed as a ſtore-ſhip. It is not to be ſaid, that becauſe the ſhip was incapable of going out upon a cruize, therefore ſhe could not make a ſeizure in port. She had arms which ſhe could ſtretch out for ſuch a purpoſe; ſhe had her boats, which might be employed on a ſervice of this kind. Is the Court in every caſe to enter upon a conſideration of the exact ſtate and condition of the ſhip by which a ſeizure is effected? Suppoſe a veſſel is in dock, undergoing repairs, that circumſtance would not ſuſpend the right of the officer in command of her to act by himſelf and his men in boats. The ſeizure may be legally effected by means of boats, or indeed without them, by a mere ſummons to the parties*. The other caſes which have been alluded to are likewiſe of a very different deſcription. A notion prevailed both at home and in the *Weſt Indies*, that officers were at liberty to put men on board as many different veſſels as they might think proper, and that the captures made by the men and veſſels ſo employed would enure to the benefit of their own ſhip, which was lying in port, and knowing nothing of the matter. The Court, as well as the Admiralty, ſets its face againſt this abuſe of commiſſions, which is thought to interfere with the rights of regular cruizers. I am clearly of opinion that this ſeizure muſt enure to the benefit of Lieutenant *Middleton*, and therefore I pronounce for a reverſal of the ſentence.

---

* *Melomane, Colas*, 5 Robinſon, 41. *Curaçoa* and its dependencies, Lords, *May* 4th 1805.

ANN, SMITH.

February 19th, 1813.

A *Britiſh*-born ſubject may, by his employment and reſidence in a foreign country, acquire a new national character for *commercial purpoſes.*

THIS ſhip, under *American* colours, was ſeized in the river *Thames*, by the marſhal of the Admiralty, on the 1ſt of *Auguſt* 1812. A claim was given by the maſter, who was alſo ſole owner of the ſhip, deſcribing himſelf to be a *Britiſh* ſubject, and as ſuch entitled to the benefit of the Order in Council of *November* 1812, directing the reſtitution of *Britiſh* ſhips under the *American* flag. It appeared that he was a native of *Scotland*, and that his wife and family reſided in that country, but that he had himſelf been admitted a citizen of *America* about ſixteen years ago, upon taking an oath that he had been ſailing out of an *American* port for two years; that from the year 1799 till 1805, he had been connected with a houſe of trade at *Glaſgow*, which had an eſtabliſhment at *New York*, and another at *Charleſtown*, and that he had occaſionally reſided at each of the laſt mentioned places; that he had purchaſed this veſſel at public auction in *America*, and had made three voyages in her, the two firſt from *Charlestown* to *Kingston* in *Jamaica*, returning each time in ballaſt, and the laſt from *Charlestown* to the river *Thames*. The queſtion was, whether, from the reſidence and employment of this man, he was, *quoad* this veſſel, to be conſidered a *Britiſh* ſubject.

JUDGMENT.

Sir *W. Scott.*—This ſhip, when ſeized by the marſhal in the river *Thames*, was under the *American* flag, but

1812. but, according to the account given by the maſter, was not furniſhed with the *American*, or indeed with any paſs whatever. It is very difficult to conceive that this was the true ſtate of the caſe, ſince the ſhip was not only *American* built, but likewiſe *American* owned, as far, at leaſt, as the oſtenſible character of the claimant is concerned; for though he could not altogether throw off his allegiance to his native country, he had been admitted a citizen of the United States. I cannot conceive, therefore, why the paſs was not granted, or what obſtacle prevented this man from obtaining ſo important a document. I muſt preſume that the veſſel was furniſhed with an *American* paſs; but, ſuppoſing the caſe to be otherwiſe, ſtill, if the ſhip was furniſhed with the documents uſually granted to *American* ſhips, the ſame rule of law muſt be applied as if ſhe had been furniſhed with a regular flag and paſs. The ſhip muſt be concluſively held to be *American* property, and conſequently ſubject to condemnation.

19th, 3.

It is ſaid, however, that this ſhip is protected by the Order in Council iſſued on the 28th of *November* 1812, by which it is directed, that "all veſſels under "the flag of the United States of *America*, which are "*bonâ fide* and wholly the property of His Majeſty's "ſubjects, and not purchaſed by them ſubſequent to "the date of hoſtilities on the part of the United "States of *America*, and which ſhall have been de-"tained in port under the embargo, or ſhall have "ſailed to or from the ports of this kingdom previous "to the knowledge of hoſtilities, and ſhall have been "captured on ſuch voyage, ſhall be reſtored to the "*Britiſh* owners, upon ſatisfactory proof being made "to the High Court of Admiralty, or the Courts of

"Vice-

" Vice-Admiralty, to which they ſhall be taken for " adjudication, that the ſaid veſſels are *bonâ fide* and " wholly the property of His Majeſty's ſubjects as " aforeſaid, and had been engaged in trade as above " deſcribed." A claim has been given for this ſhip by Mr. *Smith*, deſcribing himſelf to be a *Britiſh* ſubject; and, if he is a *Britiſh* ſubject, he will, under this Order in Council, be entitled to reſtitution.

The queſtion, therefore, comes to this, whether the claimant is, *quoad* this property, to be conſidered as a *Britiſh* ſubject. For ſome purpoſes he is undoubtedly ſo to be conſidered. He is born in this country, and is ſubject to all the obligations impoſed upon him by his nativity. He cannot ſhake off his allegiance to his native country, or diveſt himſelf altogether of his *Britiſh* character by a voluntary transfer of himſelf to another country. For the mere purpoſes of trade he may, indeed, transfer himſelf to another ſtate, and may acquire a new national character. An *Engliſh* ſubject, reſident in a neutral ſtate, is at liberty to trade with the enemy of this country in all articles, with the exception of thoſe which are of a contraband nature; but a trade in ſuch articles would be contrary to his allegiance. Now, the account which he gives of himſelf is, " that he was born at *Falkirk*, in *Scotland*; " that during the laſt ſeven years he has been chiefly " at ſea, but, when at home, he has lived, and ſtill " lives, at *Bathgate*, in the ſhire of *Linlithgow*, in " *North Britain*; that he is a ſubject of our Sovereign " Lord the King, but, about ſixteen years ago, he " was admitted a citizen of the United States of " *America*, for the purpoſe of *commerce* only." Why, *this* tranſaction is for the purpoſe of *commerce*: According

The ANN.

February 19th, 1813.

cording to his own account, then, he ceaſed to be a *Britiſh* ſubject for *commercial* purpoſes. He goes on to ſay, that he was admitted "for the purpoſe of "covering a ſhip of his own, to enable her to ſail with- "out riſk of capture, and he was ſo admitted by the "magiſtrates of *Philadelphia*, on oath being made "that he had ſailed out of an *American* port for two "years; that he hath never been admitted a burgher "or freeman of any city or town, but, from the year "1799 to the year 1805, the deponent having been "connected in a houſe of trade at *Glaſgow*, which "had a houſe at *New York*, and another at *Charleſ-* "*town* in *South Carolina*," ſo that, from 1799 to the year 1805, he might, as far as he was connected with the houſe at *Glaſgow*, and for that particular branch of his trade, be conſidered a *Britiſh* ſubject. But, ſince that time, I underſtand him to ſay, that he has withdrawn altogether from that connection. He ſays afterwards, in anſwer to the ninth interrogatory, "that he is a *North Briton* by birth, and, when he is "at home, his place of reſidence is *Bathgate*, in the "ſhire of *Linlithgow*, in *North Britain*, where his "wife and family reſide, and where he the deponent "hath always reſided from the time he was ten or "eleven years of age, when he was not at ſea or in "foreign parts." The affirmative part of his hiſtory, as far as it goes, ſhews that he lived very much abroad, and principally at *New York* or *Charleſtown* in *America*. True it is that he had no houſe in either of theſe places, but he was there as a ſingle man. It is not the mere circumſtance of leaving a wife and family in *Scotland* that will avail him for the purpoſe of retaining the benefit of his national character. He cannot be permitted to take the advantage of both characters at the

ſame

The ANN.

February 19th, 1813.

ſame time, and in the ſame adventure. The utmoſt that can be allowed to him is, that he ſhould be entitled to the one character or the other, according to the circumſtances of the tranſaction. When the veſſel herſelf is *American*-built, when the perſonal reſidence of the owner, as far as he has any, is in *America*, (for it does not appear that this man at all reſided in *Scotland*,) it would be difficult to ſay that it could be any other than an *American* tranſaction. Since the purchaſe of this ſhip by Mr. *Smith*, he has made three voyages, two of them to *Kingston* in *Jamaica*, and one to the port of *London*; but to the ports of *Scotland* he has never ſailed, nor does it appear that he has even viſited his wife and family in that country. He has been ſailing conſtantly out of *American* ports, and his prevailing deſtination has been to the *Weſt India* iſlands. It is quite impoſſible that he can be protected under the Order in Council, which applies only to thoſe who are clearly and habitually *Britiſh* ſubjects, having no intermixture of foreign commercial character. It never could be the intention of His Majeſty's Government, that the benefit of this Order ſhould be extended to a perſon who has thrown off his allegiance, and eſtranged himſelf from his *Britiſh* character, as far as his own volition and act could do. I am of opinion that Mr. *Smith* is not entitled to the benefit of the Order in Council, and therefore I reject the claim.—Ship condemned.

February 19th, 1813.

HOPE, and Others.

Certificates exempting the property of enemies from capture, if granted by persons not having a special commission for such a purpose, or holding an official situation to which such a power may be considered incidental, are in themselves invalid, but may be made effectual by a subsequent ratification by the sovereign authority.

THESE were four cases of *American* ships, laden with corn and flour, and captured whilst proceeding from *America* to the ports of *Spain* and *Portugal*. They were claimed as protected by an instrument on board, granted by Mr. *Allen* the *British* consul at *New York*, accompanied by a certified copy of a letter from Admiral *Sawyer*, the *British* commander on the *American* station.

JUDGMENT.

Sir *W. Scott*.—The destination of these vessels to the ports of *Spain* and *Portugal* is not disputed, but they would undoubtedly be liable to condemnation as enemy's property, unless the claimants can shew some special ground of exemption from hostilities.

The protection which has been set up, consists in certain papers found on board each of these ships, to which it would be difficult to give any precise designation. The first of them appears to be a kind of proclamation from Mr. *Allen*, who stat[illegible] himself to be a *British* consul at *New York*; the other is a letter addressed to this same Mr. *Allen* by Admiral *Sawyer*, the commander in chief of His Majesty's ships on the *Halifax* station. The certificate or proclamation of Mr. *Allen* states, that "whereas, from a consideration of "the vital importance of continuing a full and regular "supply of flour and other dry provisions to *Spain* "and *Portugal*, or their colonies, it has been deemed "expedient by His Majesty's Government that, not-

"withstanding

" withſtanding the hoſtilities between this country and " the United States, every degree of protection and " encouragement ſhould be given to the *American* " veſſels laden with flour and other dry proviſions, " and bound to *Spain* or *Portugal*, or their colonies; " and whereas, in furtherance of theſe views of His " Majeſty's Government, *Herbert Sawyer* Eſquire, " vice-admiral and commander in chief on the *Halifax* " ſtation, has directed to me a letter, under the date " of the 5th of *Auguſt* 1812, (a copy of which is " herewith annexed,) wherein I am inſtructed to fur- " niſh to *American* veſſels ſo laden and deſtined a " copy of his letter, certified under my conſular ſeal, " which documents are intended to ſerve as a perfect " ſafeguard and protection to ſuch veſſels in the pro- " ſecution of their voyage: Now, therefore, in pur- " ſuance of theſe inſtructions, I have granted to the " *American* ſchooner called the *Hope*, of one hundred " and twenty-one tons burthen, whereof *Benjamin* " *Holbrook* is maſter, now lying in the port of *Phila-* " *delphia*, and laden with flour, rice, and corn, a " copy of the ſaid letter of Vice-admiral *Sawyer*, cer- " tified under my conſular ſeal, hereby requeſting all " officers of His Majeſty's ſhips of war, or private " armed veſſels belonging to the ſubjects of His Ma- " jeſty, not only to offer no moleſtation to the ſaid " veſſel, but, on the contrary, to grant her all proper " aſſiſtance and protection on her paſſage to *Corunna* " in *Spain*, and on her return from thence to a port " in the United States, whether laden with ſalt or in " ballaſt only." The letter of Admiral *Sawyer* addreſſed to this gentleman, Mr. *Allen*, is in theſe terms: " I have fully conſidered that part of your letter which " relates to the means of inſuring a conſtant ſupply of

The Hope, and Others.

February 19th, 1813.

" flour and other dry proviſions to *Spain* and *Portu-*
" *gal*, and to the *Weſt Indies*; and, being aware of
" the importance of the ſubject, concur in the pro-
" poſition you have made: I ſhall therefore give
" directions to the commanders of His Majeſty's ſqua-
" dron under my command, not to moleſt *American*
" veſſels unarmed and ſo laden, *bonâ fide* bound to
" *Portugueſe* or *Spaniſh* ports, whoſe papers ſhall be
" accompanied with a certified copy of this letter under
" your conſular ſeal." And it is contended, that theſe two papers, particularly as recognized by the Order in Council of the 26th of *October* 1812, are of ſuch a nature as to take from theſe veſſels the character of hoſtility. It is much to be lamented that the previous correſpondence which muſt have taken place between theſe gentlemen does not make its appearance. The Court is left to gueſs at the contents of the letter, which muſt have been ſent in the firſt place from Mr. *Allen*, the conſul, to Admiral *Sawyer*; but it is, I think, fair to infer, that it contained a propoſition that the tranſaction ſhould take the ſhape which this has actually done, namely, that a copy of Admiral *Sawyer*'s letter ſhould be put on board for the purpoſe of guaranteeing, as far as he could, the ſafety of the ſhips to which it might be furniſhed. I think it perfectly clear that Mr. *Allen*'s letter muſt have contained a propoſition to that effect. Though not exhibited, it proves itſelf by the ſequel of facts.

Now, taking it that there was nothing further in the way of ſafeguard than what is to be derived from theſe papers, it certainly would be impoſſible to hold that the property is ſufficiently protected. The inſtrument of protection, in order to be effectual, muſt come from thoſe who have a competent authority to grant

The Hope, and Others.

February 19th, 1813.

grant ſuch a protection: but theſe papers come from perſons who are veſted with no ſuch authority.

To exempt the property of enemies from the effect of hoſtilities, is a very high act of ſovereign authority: if at any time delegated to perſons in a ſubordinate ſituation, it muſt be exerciſed either by thoſe who have a ſpecial commiſſion granted to them for the particular buſineſs, and who, in legal language, are termed *mandatories*, or by perſons in whom ſuch a power is veſted in virtue of any official ſituation to which it may be conſidered incidental. It is quite clear that no conſul in any country, particularly in an enemy's country, is veſted with any ſuch power in virtue of his ſtation. *Ei rei non præponitur*, and therefore his acts relating to it are not binding. Neither does the admiral, on any ſtation, poſſeſs ſuch authority. He has indeed power relative to the ſhips under his immediate command, and can reſtrain them from committing acts of hoſtility, but he cannot go beyond that; he cannot grant a ſafeguard of this kind beyond the limits of his own ſtation. The protections, therefore, which have been ſet up, do not reſult from any power incidental to the ſituation of the perſons by whom they were granted; and it is not pretended that any ſuch power was ſpecially entruſted to them, for the particular occaſion. If the inſtruments which have been relied upon by the claimants are to be conſidered as the naked acts of theſe perſons, then are they in every point of view totally invalid.

But the queſtion is, whether the *Britiſh* Government has taken any ſteps to ratify and confirm theſe proceedings, and thus to convert them into valid acts of ſtate; for perſons not having full powers may make what in law are termed *ſponſiones*, or, in diplomatic

The Hope, and others.

February 19th, 1813.

language, treaties *ſub ſpe rati*, to which a ſubſequent ratification may give validity:—*Ratihabitio mandato æquiparatur*. Has the Government done any thing to give theſe papers an authority which they did not before poſſeſs? It appears that Mr. *Foſter* had been in the habit of granting protections of this kind, and that, immediately before the preſent tranſaction commenced, an Order in Council, dated the 13th of *October* 1812, had iſſued, for the purpoſe of recognizing and giving effect to his licences. The Order is in theſe terms:—
"Whereas paſſports have been granted by His Ma-
"jeſty's miniſter in *America*, for the protection of
"veſſels proceeding with cargoes of grain and flour to
"the ports of *Liſbon* or *Cadiz*, His Royal Highneſs
"the Prince Regent, in the name and on the behalf
"of His Majeſty, is pleaſed, by and with the advice
"of His Majeſty's Council, to order, and it is hereby
"ordered, that all ſuch veſſels ſhall be permitted to
"proceed, according to the tenor of the ſaid paſſports,
"without moleſtation on account of the preſent hoſ-
"tilities." Thus the policy of the meaſure reſorted to by the *Britiſh* miniſter in *America*, and the manner of carrying it into execution, had both been ſanctioned by the Government at home. Mr. *Foſter*, it ſeems, retired from the country, and then the preſent mode was reſorted to by Mr. *Allen* and Admiral *Sawyer*. It is impoſſible to deny that the tranſaction has been put into a very awkward ſhape, and it is clear, from a letter on board one of theſe ſhips, that the *Americans* themſelves did not place full confidence in the protection to be derived from theſe inſtruments. The courſe which has been purſued is certainly indirect and circuitous, but this may have ariſen from the neceſſity of the caſe. Every man would be deſirous of taking the ſhorteſt

The Riſing Sun.

The HOPE, and Others.

February 19th, 1813.

ſhorteſt courſe he could, but the direct line cannot always be travelled: if you meet with obſtacles in your way, you muſt make flexures, in order to avoid them. The method which Admiral *Sawyer* and Mr. *Allen* have adopted is, perhaps, the beſt that could have been deviſed under the difficulties which occurred. It does not appear that the buſineſs could have been ſo well effected in any other way.

It has been aſked, Why could not Admiral *Sawyer* have granted theſe licences directly from himſelf? It is ſaid, that he might have put them on ſhore, and ſent them by land from *Halifax* to *Boſton* and other places. I am not ſure that this could have been done, or, if it could, that it would have been ſo adviſeable as the mode which has been adopted. For, if Mr. *Allen* could be depended upon as an honeſt and upright man, he was certainly the proper perſon to exerciſe a diſcretion on the ſubject. He was upon the ſpot, and had the beſt opportunity of judging to whom the protections ſhould be granted. As far as I can ſee, Mr. *Allen* has exerciſed his judgment very properly; for, in theſe four caſes, the veſſels were all ſailing to the ports ſpecified in the paſſports, and were all laden with proper cargoes. I do not think the informality of the inſtruments to be a fatal objection. The ſubſtance of the meaſure is preciſely the ſame as that reſorted to by Mr. *Foſter*, and the variation in point of form is not very material. The policy of granting theſe protections was admitted and approved by the Government at home in the caſe of Mr. *Foſter*, and this is the ſame meaſure, varied as to its form on account of the difcu lties which occurred after the departure of that gentleman.

The Hope, and Others.

February 19th, 1813.

Let us ſee what has been done by the Government to recognize theſe acts of Admiral *Sawyer*'s. Why, here is an Order, dated on the 26th of *October*, in theſe terms:—" Whereas it has been repreſented to " His Royal Highneſs the Prince Regent, that paſſ- " ports or certificates of protection have been granted " by Vice-admiral *Sawyer*, commanding His Majeſty's " ſhips on the *Halifax* ſtation, to certain *American* " veſſels, with cargoes of grain and flour, proceeding " from the ports of the United States to *Spain* or *Por-* " *tugal*,—His Royal Highneſs the Prince Regent, in " the name and on the behalf of His Majeſty, is pleaſed, " by and with the advice of His Majeſty's Privy " Council, to order, that all ſuch veſſels and cargoes " ſhall be allowed to proceed, according to the tenor " of the ſaid paſſports or certificates, without moleſta- " tion on account of the preſent hoſtilities. And it " is hereby further ordered, that if any ſuch ſhips and " cargoes ſo proceeding ſhall have been detained and " brought in for adjudication, they ſhall forthwith be " liberated and releaſed." It is ſaid, that theſe papers do not anſwer the deſcription, that they are neither *paſsports* nor *certificates*, and conſequently that they are not within the Order. Perhaps they are not, in point of ſtrict form, *paſſports* or *certificates*; but in ſubſtance they are and were intended to have the ſame effect. It is ſaid, that Admiral *Sawyer*'s letter only protects theſe veſſels from capture by his own cruizers. This was, indeed, all that he thought himſelf authorized to do; but the deficiency is ſupplied by the proclamation of Mr. *Allen*, who adopts the letter of Admiral *Sawyer*, and engrafts upon it a protection for the whole voyage. The Order in Council goes ſtill further,

The Hope, and Others.

February 19th, 1813.

further, and exempts the veſſels from capture, not only whilſt proceeding to the ports of *Spain* and *Portugal*, but on their return-voyage alſo. If theſe are not the certificates and paſſports contemplated in the Order iſſued by the Government, I would aſk what are, and where are they to be found? Government muſt have had in their contemplation either theſe or none, for it is not pretended that any others were granted by Admiral *Sawyer*. If the Order does not apply to theſe, then is it wholly inoperative. I am ſatisfied that theſe are the certificates or paſſports contemplated in the Order of Council, and therefore I have no doubt as to the reſtitution of this property. At the ſame time, I think the captors were juſtifiable, under the circumſtances of the caſe, in detaining theſe veſſels, and conſequently that they are entitled to their expences.—— Ships and cargoes reſtored, ſubject to the payment of captor's expences.

February 24th, 1813.

VROW MINA, BEHRENDS.

The Court will entertain a ſuit for wages in the caſe of a foreign ſhip belonging to an alien enemy, and coming to the ports of this country under a *Britiſh* licence.

THIS was a proceeding inſtituted by a foreign mate againſt a foreign ſhip, for the recovery of his wages; and the demand was oppoſed by the agent of the owner, who appeared under proteſt. The veſſel belonged to an alien enemy, but had come to this country under the protection of a *Britiſh* licence.

JUDGMENT.

Sir *W. Scott*.—The Court is extremely ſhy of interfering in caſes of this kind, where foreigners only are concerned, without the conſent of the repreſentative of the nation to which the parties belong. In this caſe it is impoſſible that any ſuch conſent ſhould be obtained, the ſhip being an enemy's ſhip, coming to the ports of this country under a licence obtained for that purpoſe from the *Britiſh* Government. The maſter took up money for the repairs of the ſhip, but whether he did ſo by order of the agent or the owner does not exactly appear. The mate has ſworn that Meſſrs. *Day* and *Phillips* of *Portſmouth* advanced the money by the direction of Mr. *Leaven*, the agent and correſpondent of the owner in this country. They ſtate, on the other hand, that the maſter applied to them for the neceſſary ſupply, and that they never conſidered Mr. *Leaven* to be reſponſible to them for the payment of the money ſo advanced; but always held, and ſtill hold, the ſhip and cargo as their ſecurity for the repayment. They do not produce, or pretend to be poſſeſſed of, any

hypothecation

The VROW MINA.

February 24th, 1813.

hypothecation bond, and therefore can have no lien on the ſhip; for, though the general maritime law of *Europe* does not require a bond of hypothecation, yet, by the law of this country, an inſtrument of this kind is abſolutely neceſſary. The maſter, it appears, abſconded; and the mate ſwears, that, in conſequence of his retirement, he took charge of the ſhip, by agreement with the agent in *London*, at the monthly wages of forty-four guilders *Dutch* currency, and the ſum of one pound *per* week for board-wages. I do not think this an extravagant ſum for the ſubſiſtence of this man, who muſt otherwiſe have been ſupported from the ſhip's ſtores. Being promoted to the ſituation of maſter, he had new care and trouble impoſed upon him, and was therefore entitled to additional remuneration. I think the mate is fully juſtified in making this application to the Court. I ſhall therefore over-rule the proteſt, and decree the ſale of the ſhip for the payment of the wages and ſubſiſtence money.

February 24th, 1813.

ALERT, NICHOLLS.

Invalided ſoldiers on board a capturing ſhip are entitled to ſhare in the proceeds of prize.

THIS was a claim on behalf of 351 invalided ſoldiers, who were returning from *Liſbon* to this country on board His Majeſty's ſhips *Veſtal* and *Diadem*, to ſhare in the proceeds of a prize captured by thoſe ſhips in the courſe of the voyage.

45 G. 3. c. 72. ſ. 2.

Againſt the claim—*The King's Advocate and Phillimore.*—The Prize Act veſts the intereſt and property in prizes generally in all the officers, ſeamen, marines, and ſoldiers, who are on board at the time of capture; but then it muſt be remembered, that the ſame act, in the ſame ſection, directs the proceeds to be divided in ſuch proportion and after ſuch manner as His Majeſty has, by his proclamation directed. The proclamation, therefore, being diſtinctly recognized as the rule of interpretation to the Prize Act, in order to aſcertain the preciſe meaning of the term "Soldiers" in the Prize Act, we muſt purſue the expreſſion into the proclamation, and ſee the ſenſe affixed to it there; and accordingly we find that it limits the meaning of "Soldiers" to "private marines and ſoldiers *doing* "*duty* on board." The ſoldiers, therefore, on board theſe ſhips, are not ſoldiers in the ſenſe and meaning of the Prize Act; ſince they were not only *not doing duty*, but, from their very deſcription, were incapable of performing any ſervice of importance. It may, perhaps, be ſaid, that theſe men are entitled to ſhare as paſſengers, or ſupernumeraries; but the limitations in

The ALERT.

February 24th, 1813.

in the proclamation are, upon this point, equally preciſe and definite. Paſſengers and other perſons borne as ſupernumeraries are, indeed, entitled to ſhare in the prizes which may happen to be taken; but then it is requiſite they ſhould be ſuch as are "*doing duty and* "*aſſiſting on board.*" In neither of theſe claſſes, then, is there any opening to admit the claim of diſabled and invalided ſoldiers. It is poſſible that no oppoſition may have been raiſed to a demand of this kind, where the claimants have been few in point of number; but in the preſent inſtance, where they equal, if not exceed, the number of the ſhip's crew, it would operate as a great hardſhip on the ſeamen, if they ſhould be compelled to ſhare the fruit of their labours with a claſs of perſons who could have rendered them no aſſiſtance in an engagement, but muſt, on the contrary, have proved a conſiderable incumbrance to their exertions. In the ſpirit of the Prize Act and the Proclamation, remuneration and ſervice are, throughout, correlative terms; and conſequently, where no ſervice has been rendered, no reward can be due.

Jenner, contrà.—It can never be admitted that invalided ſoldiers are utterly incapacitated from rendering aſſiſtance in a naval engagement. They may be very uſeful in annoying the enemy with their muſkets, in conveying ammunition, and in performing a variety of other ſervices. They muſt therefore be conſidered as forming a component part of the ſhip's force. Every perſon is preſumed to have the diſpoſition and the power to afford ſome degree of aſſiſtance; and the common underſtanding has been, that all perſons on board at the time of capture have a right to ſhare in the prize. In the caſe of *Wemyſs* and *Linzee*, the right Dougl. Rep. 224.

The ALERT.

February 24th, 1813.

of a paſſenger to ſhare was not denied, and the only doubt was, reſpecting the claſs in which the perſon there making the claim was to be included. Where the Prize Act and Proclamation differ from each other, the Act of Parliament neceſſarily controls the Proclamation. The fifth ſection of the Prize Act clearly veſts in theſe men the right to head-money, which it muſt be obſerved is given for every perſon, without exception, on board the enemy's ſhip. Head-money is ſtrictly confined to actual captors; and it ſeems abſurd to ſay, that theſe men ſhall be entitled to head-money as actual captors, and not to the proceeds of prize, which are frequently ſhared with conſtructive joint-captors. With reſpect to the practice which has prevailed in ſimilar caſes, that has been uniformly in favour of the right of ſoldiers, and of all others, to ſhare in the prizes which may happen to be taken whilſt they are on board. Militia regiments, coming from *Ireland* in King's ſhips, have very lately been allowed this advantage, and the right has in no former inſtance been diſputed.

JUDGMENT.

Sir *W. Scott*.—This is the caſe of a number of invalided ſoldiers, who claim to ſhare in a prize taken by two of His Majeſty's ſhips, in which they were embarked, on their voyage from *Portugal* to *England*. A doubt has been ſtarted reſpecting the right of theſe men to participate in the proceeds of a prize taken under ſuch circumſtances, but I am of opinion that their claim is well founded. The Act of Parliament gives the whole intereſt and property, in all prizes which they may take, "to the flag-officers, com-"manders, and other officers, ſeamen, marines, and "ſoldiers,

" ſoldiers, on board any ſhip or veſſel of war in His " Majeſty's pay:" and perhaps the term *Soldiers*, ſtanding as a component part of the text in this clauſe of the act, may mean ſuch military perſons as may happen to be doing duty on board as marines. But the ſtatute directs diſtribution to be made according to the King's Proclamation; and the Proclamation, according to ancient uſage, gives a ſhare " to all marines " and other ſoldiers, *and all other perſons doing duty* " *and aſſiſting on board.*" This muſt be held to include all ſupernumeraries and paſſengers, ſince every perſon is preſumed to be willing and able to give aſſiſtance, if required ſo to do; and the preſumption, with reſpect to ſoldiers, is particularly ſtrong. I underſtand, from an enquiry which I cauſed to be made at the Admiralty, that the maritime crew is uſually leſſened when ſoldiers are ſent on board any of His Majeſty's ſhips, and that they are conſidered as perſons capable of affording aſſiſtance in a variety of ways. The right of ſoldiers to ſhare in all prizes at the capture of which they may have been preſent, has been invariably admitted in this Court, and the ſame doctrine has been held in the Court of King's Bench. In the caſe of *Wemyſs* and *Linzee*, which was twice tried in that Court, the right of paſſengers to ſhare was treated as a matter always acquieſced in; but it was ruled that they all took as ſupernumeraries only, and ranked in the loweſt claſs of diſtribution. It is clear, therefore, that ſoldiers on board a capturing ſhip have, generally ſpeaking, a right to prize money; and, unleſs this caſe can be ſpecially diſtinguiſhed from others, the preſent claimants muſt be entitled to the benefit of the general rule. Now, the only diſtinction which

The ALERT.

February 24th, 1813.

has been pointed out is, that theſe men are *invaliaed*; but this I think by no means a ſufficient diſtinction. Though *invalided*, they are ſtill fit for ſome duty, even upon land: though diſabled from field-ſervice and the more active operations of war, they are ſtill uſeful for the purpoſes of defence, and upon that account form part of the uſual military force of every country. On board ſhips of war they may certainly be very ſerviceable during an engagement, and therefore I think the circumſtance of their being *invalided* forms no ſolid ground of diſtinction. If any inconvenience ariſes from the increaſed practice of carrying ſoldiers on board the King's ſhips, a remedy for that inconvenience muſt be ſought by means of ſome legiſlative proviſion. I underſtand that ſoldiers are uſually put on board veſſels armed *en flute*, and that much dependence is placed on their aſſiſtance in time of action. I am clearly of opinion, that, according to the ancient practice of the ſervice, and the true conſtruction of the Prize Act and the Proclamation, theſe invalided ſoldiers are entitled to ſhare in the proceeds of this prize.

SEYERSTADT, Erbe.

March 9th, 1813.

THIS was the caſe of a ſhip under *Daniſh* colours, laden with a cargo of ſalt, copper, train-oil, and herrings, with which ſhe was proceeding, at the time of capture, from *Drontheim* to *Flendſberg* in *Jutland*. A licence had been obtained for this veſſel, permitting her to ſail with a cargo "from *Liverpool* to any port "in *Denmark*, with liberty to touch at a port in *Nor-* "*way* for clearances." It appeared that ſhe had ſailed from *Liverpool* with a quantity of ſalt and ſome bales of *Britiſh* manufactures, the latter of which had been put on ſhore at *Drontheim*, and that ſhe was about to proceed from that port to *Flendſberg*, with her cargo of ſalt, when, according to the repreſentation of the maſter, the cuſtom-houſe officers compelled him to take on board a quantity of copper, train-oil, and herrings, for the uſe of the Victualling Board of *Denmark*.

The violence of a hoſtile government will not privilege perſons to act in contravention of the eſſential terms of a *Britiſh* licence.

For the captors, *the King's Advocate* and *Daubeney* contended for condemnation under the authority of the *Catherina Maria*. Edw. Rep. 338.

For the claimants, *Phillimore* and *Luſhington* admitted that the ſhip and cargo would have been liable to condemnation, provided the goods had been taken on board voluntarily, but contended that a different rule muſt be applied to the preſent caſe, ſince the maſter had acted under dureſs and compulſion impoſed upon him by the ſovereign power of his own country. That the public faith was pledged to afford protection

under the licence, ſo long as the conditions of it were fulfilled as nearly as controlling circumſtances would admit*. That the parties had here acted *cypres* the terms of the licence, and that there was no impeachment of due diligence or good faith; that the veſſel had, for ſeveral preceding voyages, in defiance of the prohibition of her own government, maintained an active and uſeful commerce with the ports of this country; and was, upon that account, entitled to great indulgence.

JUDGMENT.

Sir *W. Scott.*—This is the caſe of a *Daniſh* ſhip, which ſailed from *Liverpool* to *Flendſberg*, under a licence permitting her to touch at *Drontheim* for clearances, and for clearances only. It turns out, however, that ſhe puts part of her cargo on ſhore at that place, and takes on board other goods, of a very noxious quality, conſiſting of copper and train-oil, for the uſe of the *Daniſh* Government. This is uſing a *Britiſh* licence for the moſt noxious purpoſe to which it can well be applied. It is true that the antecedent voyages of this maſter have been in the ſervice of this country, but the preſent employment of the ſhip is of a very different kind, and muſt work a forfeiture of any protection to which ſhe might otherwiſe be entitled.

It has been admitted that this ſhip and cargo would be liable to condemnation if the act of conveying theſe goods had been voluntary on the part of the maſter; but it is ſaid that the meaſure was forced upon him by the act of the *Daniſh* Government, and that he was compelled to take them on board, having firſt proteſted againſt it, but without effect. I am afraid that it is neceſſary

The SEVERSTADT.

March 9th, 1813.

* *Catharina Maria*, Edw. Rep. 338.

neceſſary for the Court to adhere to the rule laid down in a former caſe*, that the plea of compulſion is inadmiſſible. It would be impoſſible for the Court to protect itſelf otherwiſe againſt the inceſſant attempts which might be made to elude its vigilance by pretences of that nature. It could never diſcover, with certainty, whether a tranſaction taking place in an enemy's port were voluntary or not. Compulſion would always be pleaded, though in many caſes the parties might be acting colluſively. It is neceſſary, therefore, to keep the door ſhut againſt ſuch explanations.

The Court has always held, in caſes of this kind, that the party muſt look for indemnification to the quarter from which he has received the injury; and in the preſent caſe the maſter himſelf holds the ſame language. He has made this matter the ſubject of a proteſt; but againſt whom does he proteſt?—againſt the Inſpector of the Cuſtoms at *Drontheim*, upon whom he throws the reſponſibility. It is ſaid, that the maſter could not have proceeded to enforce his remedy, becauſe he could not with ſafety have produced his *Britiſh* licence. But there was no neceſſity for producing the *Britiſh* licence in order to ſhew the injuſtice of forcing him to go on a voyage from one *Daniſh* port to another, by which he would be expoſed to the danger of *Britiſh* capture. The licence would have been quite out of the queſtion, when the only charge was, that he had been compelled to undertake a prohibited voyage. It would by no means occaſion the difficulties which have been repreſented. I think myſelf under the neceſſity of adhering to the rule which has been laid down, that the violence of a hoſtile government ſhall not privilege perſons to act in contravention of the eſſential terms of a *Britiſh* licence.

March 9th, 1813.

ELIZA ANN, and Others.

A declaration of war by the government of one country againſt another is evidence of the exiſtence of a war between the two countries; and by the modern uſage of ſtates a ſubſequent ratification by the ſovereign authority is neceſſary to give effect to a treaty of peace, although the treaty itſelf may have been ſigned by plenipotentiaries.

THESE were three caſes of *American* ſhips, laden with hemp, iron, and other articles, and ſeized in *Hanoe Bay*, on the 11th of *Auguſt* 1812, by His Majeſty's ſhip *Vigo*, which was then lying there with other *Britiſh* ſhips of war. A claim was given, under the direction of the *Swediſh* miniſter, for the ſhips and cargoes, "as taken within one mile of the main land "of *Sweden*, and within the territory of His Majeſty "the King of *Sweden*, contrary to and in violation of "the law of nations and the territory and juriſdiction "of His ſaid Majeſty."

JUDGMENT.

Sir *W. Scott*.—Theſe veſſels came into *Hanoe Bay* for the purpoſe of taking the benefit of *Britiſh* convoy, and were ſeized in conſequence of the order for the detention of *American* property. This order has been ſince followed up by a declaration of war; the ſhips, therefore, would be liable to condemnation, unleſs it can be ſhewn that they are entitled to ſome ſpecial protection.

A claim has been given, by the *Swediſh* conſul, for theſe ſhips and cargoes, as having been taken within the territories of the King of *Sweden*, and in violation of his territorial rights. This claim could not have been given by the *Americans* themſelves, for it is the privilege, not of the enemy, but of the neutral country, which has a right to ſee that no act of violence is committed within its juriſdiction. When a violation of

of neutral territory takes place, that country alone, whoſe tranquillity has been diſturbed, poſſeſſes the right of demanding reparation for the injury which ſhe has ſuſtained. It is a principle which has been eſtabliſhed by a variety of deciſions, both in this and the ſuperior Court, that the enemy, whoſe property has been captured, cannot himſelf give the claim, but muſt reſort to the neutral for his remedy. Acts of violence by one enemy againſt another are forbidden within the limits of a neutral territory, unleſs they are ſanctioned by the authority of the neutral ſtate, which it has the power of granting to either of the belligerents, ſubject, of courſe, to a reſponſibility to the other. A neutral ſtate may grant permiſſion for ſuch acts beforehand, or acquieſce in them after they ſhall have taken place; or it may, as has been done in the preſent inſtance, ſtep forward and claim the property.

I do not obſerve it to be ſtated in the claim, that the ſovereign on whoſe behalf it is given was a neutral at the time when the tranſaction took place. But, in order to give effect to a claim of this kind, it muſt be ſhewn that the party making it was then in a ſtate of clear and indiſputable neutrality. If he has ſhewn more favour to one ſide than to the other, if he has excluded the ſhips of one of the belligerents from his ports, and hoſpitably received thoſe of the other, he cannot be conſidered as acting with the neceſſary impartiality. I do not think a country, ſhewing ſuch an invidious diſtinction, entitled to claim in the character of a neutral ſtate. The high privileges of a neutral are forfeited by the abandonment of that perfect indifference between the contending powers in which the eſſence of neutrality conſiſts.

A claim, however, has been given by the *Swediſh* miniſter. Now, in order to ſupport and give effect to

The ELIZA ANN.

March 9th, 1813.

this claim, two things are neceſſary to be eſtabliſhed.—Firſt, it is requiſite that *Sweden* ſhould appear to have been in a ſtate of perfect neutrality at the time when the ſeizure was made.—Secondly, it muſt be ſhewn that the act of violence was committed within the limits of *Swediſh* territory. For, if the ſcene of hoſtility did not lie within the territories of the neutral ſtate, then has there been no violation of its neutral rights, and conſequently there exiſts no ground of complaint, and no foundation for the claim.

The firſt queſtion then is, how far, in *Auguſt* 1812, *Sweden* was to be conſidered as a neutral country.

It is not to be diſputed that the conduct of *Sweden* towards this country had been, for a conſiderable time, of a very unfriendly deſcription. Impelled by fear, or ſome other motive, ſhe had excluded *Britiſh* ſhips from her ports, and had, either from choice or compulſion, adopted that courſe of policy which has been impoſed by the *French* ruler on the other nations of *Europe*, and which has been termed *the continental ſyſtem*. It is clear, too, that *Sweden* acted in this manner, not from any private views reſpecting her own municipal regulations, but in the execution of a plan auxiliary to the enemy of this country. *Sweden*, therefore, by her conduct, afforded to *Great Britain* a legitimate cauſe of war, and perfectly juſtified the ſeizure of *Hanoe* by the *Britiſh* admiral. The ſeizure of this place has been countenanced by the Government of this country, the *Britiſh* flag has been hoiſted, and every act of ſovereignty exerciſed on the iſland and the roadſted adjoining.

This was the ſtate of things originally; *Britiſh* ſhips were excluded from the ports of *Sweden*, and the iſland of *Hanoe* was occupied by *Britiſh* forces.

After

The ELIZA ANN.

March 9th, 1813.

After this, a declaration of war was iſſued by the Government of *Sweden*; but it is ſaid, that the two countries were not, in reality, in a ſtate of war, becauſe the declaration was *unilateral* only. I am, however, perfectly clear that it was not the leſs a war on that account, for war may exiſt without a declaration on either ſide. It is ſo laid down by the beſt writers on the law of nations. A declaration of war by one country only is not, as has been repreſented, a mere challenge, to be accepted or refuſed at pleaſure by the other. It proves the exiſtence of actual hoſtilities on one ſide at leaſt, and puts the other party alſo into a ſtate of war, though he may, perhaps, think proper to act on the defenſive only. It is the leſs neceſſary for me to inſiſt on the truth of this poſition, ſince the language of the treaty places the matter beyond diſpute. What appears to have been the motive which led to the appointment of the plenipotentiaries? Why, "a reciprocal deſire to *put an end to the war which* "*had taken place*;" and this they are authorized to carry into effect. Here then is a direct recognition of the exiſtence of an antecedent ſtate of war between the two countries. I cannot dive into the motives which led to the hoſtile declaration on the part of the *Swediſh* Government, I can only look to the broad fact, the exiſtence of the war. It may be true that *Sweden* reſorted to the meaſure with great reluctance. It is to be hoped that all countries are unwilling to enter upon hoſtilities, and that they have recourſe to them only with a view of avoiding greater evils. It is ſaid, that *Sweden* acted from fear of the reſentment of *France*, and it may be that ſhe did ſo; but, from whatever cauſe it proceeded, the fact is, that a war did take place, though it was carried on with inertneſs by *Sweden*, and with forbearance by *Great Britain*. This war has, however,

Appendix C.

The ELIZA ANN.

March 9th, 1813.

however, been happily terminated by a treaty of peace, which was ſigned by the plenipotentiaries of the two countries, on the 18th of *July*, ratified by the Prince Regent of *Great Britain* on the 4th of *Auguſt*, and by the King of *Sweden* on the 17th of the ſame month. From the reſult of theſe dates it has been contended, that the war had ceaſed, and that friendſhip had been re-eſtabliſhed before the time when theſe veſſels were ſeized. The queſtion, therefore, comes to this, whether a ratification is or is not neceſſary to give effect and validity to a treaty ſigned by plenipotentiaries. Upon abſtract principles we know that, either in public or private tranſactions, the acts of thoſe who are veſted with a plenary power are binding upon the principal. But, as this rule was in many caſes found to be attended with inconvenience, the later uſage of States has been to require a ratification, although the treaty may have been ſigned by plenipotentiaries. According to the practice now prevailing, a ſubſequent ratification is eſſentially neceſſary; and a ſtrong confirmation of the truth of this poſition is, that there is hardly a modern treaty in which it is not expreſsly ſo ſtipulated; and therefore it is now to be preſumed, that the powers of plenipotentiaries are limited by the condition of a ſubſequent ratification. The ratification may be a form, but it is an eſſential form; for the inſtrument, in point of legal efficacy, is imperfect without it. I need not add, that a ratification by one power alone is inſufficient; that, if neceſſary at all, it muſt be mutual; and that the treaty is incomplete till it has been reciprocally ratified.

It is ſaid, however, that the treaty, when ratified, refers back to the time of its ſignature by the plenipotentiaries, and that it does ſo in this caſe more eſpecially on account of the terms in which it is drawn. The words

words in one of the articles of the treaty—" *Dès ce* " *moment tout ſujet de méſintelligence, qui ait pu ſubſiſter* " *ſera regardé comme entièrement ceſſant et détruit,*" have been pointed out, and from theſe it has been contended, that all hoſtilities were to ceaſe the moment the treaty was ſigned. But I take that not to be the caſe; the poſitive and enacting part of the article is, that there *ſhall* be a firm and inviolable peace between the two countries; the other part is *deſcriptive* only of the pacific intention of the parties, and of their agreement to bury in oblivion all the cauſes of the war. It does not ſtand in the ſame ſubſtantive way as the former part of the article, and muſt be conſidered as mere explanatory deſcription. The nature of a treaty of peace is well explained by *Vattel*, who lays it down that " a treaty of peace can be no more " than *an agreement.* Were the rules (he ſays) of " an exact and preciſe juſtice to be obſerved in it, " each punctually receiving all that belongs to him, " a peace would become impoſſible." He goes on to ſay, that " as in the moſt juſt cauſe we are never to " loſe ſight of the reſtoration of peace, but are con- " ſtantly to tend towards this ſalutary view, no other " way is left than to agree on all the claims and griev- " ances on both ſides, and to extinguiſh all differences " by the moſt equitable convention which the juncture " will admit of." It is therefore an agreement to wave all diſcuſſion concerning the reſpective rights of the parties, and to bury in oblivion all the original cauſes of the war. It is an explanation of the nature of that peace and good underſtanding which is to take place between the two countries, whenever that event ſhall be happily accompliſhed. It would be a ſtretch beyond the limits to which a fair interpretation of theſe words could be carried, to ſay they were intended to convey

Book 4. c. 2.

any

The Elsa Ann.

March 9th, 1813.

any other meaning. I am of opinion, therefore, that the ratification is the point from which the treaty muſt take effect. *Dès ce moment* muſt be referred to the moment at which the treaty received its valid exiſtence by mutual ratification. It is perfectly clear that it was ſo conſidered on the part of *Sweden*. The *Britiſh* officer who was ſent to the *Swediſh* coaſt was ſtill received with the ſame caution as in the time of war, and was blindfolded before he was permitted to enter *Carlſham*. *Hanoe* remained in *Britiſh* poſſeſſion, and the only communication between that iſland and the main land of *Sweden* was by flags of truce. Though it was reaſonable to expect that *Sweden* would return to the relations of amity with this country, yet it is quite clear that ſhe had not at that time confirmed the treaty, and therefore could not be entitled to the benefit of a neutral character.

But, in order to give validity to the preſent claim, another propoſition muſt neceſſarily be maintained: It muſt be ſhewn that the place of capture was within the *Swediſh* territories; and I am of opinion that it was not. *Hanoe* had been taken poſſeſſion of by a *Britiſh* force, and that poſſeſſion had not been diſturbed. If it was taken at firſt by connivance, and by a ſeizure that was hoſtile in appearance only, it was certainly in direct hoſtile poſſeſſion afterwards. The fact that the roadſted was occupied by a *Britiſh* force is avowed by the *Americans* themſelves, who ſay, that they came there to obtain the protection of *Britiſh* ſhips of war. This muſt be conſidered as a direct recognition that it was *a Britiſh*, not *a Swediſh* ſtation; for *Britiſh* ſhips were excluded from the ports of *Sweden*. There was no ſemblance of *Swediſh* authority; and the mere vicinity of the main land of *Sweden* will not in the leaſt degree alter the caſe. Where two countries are ſepa-

rated

rated from each other by a very narrow ſpace, it does not follow that one of them may not exerciſe the rights of war within the limits of that ſpace, merely becauſe it may occaſion ſome inconvenience to its neighbour. Suppoſe *Great Britain* at war, and *Spain* in a ſtate of neutrality, can it be ſaid that *Spain* could require this country to abſtain from capturing the veſſels of her enemy in the Streights of *Gibraltar?* Such a proceeding might be inconvenient to *Spain*, on account of the proximity of her coaſt; but that is a circumſtance which could not abridge the undoubted right of *Great Britain.* It is an incidental inconvenience, ariſing neceſſarily from the vicinity of the two countries. I am of opinion that the claim which has been given fails upon the two eſſential points, both in reſpect of the neutrality of *Sweden*, and of the neutrality of the place of capture, and conſequently that theſe ſhips and cargoes are liable to condemnation.

The ELIZA ANN.

March 9th, 1813.

GUTE HOFFNUNG, STEFFENS.

March 11th, 1813.

THIS was the caſe of a ſhip under the *Roſtock* flag and paſs, but deſcribed by the maſter, in his depoſitions, to belong to a perſon reſident at *Hull.* She was captured on a voyage from *Hull* to *Tonningen*, having a *Britiſh* licence on board, granted for "*the* "*Mecklenburgh ſhip the Gute Hoffnung;*" and the queſtion was, whether the repreſentation made by the maſter, that the owner reſided in this country, would take the ſhip out of the protection to which ſhe would otherwiſe be entitled under the terms of the licence.

A licence for a foreign ſhip will not protect one that is in fact and in appearance *Britiſh*, but where the ſhip bears every appearance of being foreign, the Court will not inquire whether there is any *Britiſh* intereſt.

JUDGMENT.

The GUTE HOFFNUNG.

March 11th, 1813.

JUDGMENT.

Sir *W. Scott.*—This ſhip was proceeding from *Hull* to *Tonningen*, under a licence in which ſhe is deſcribed as *the Mecklenburgh ſhip the Gute Hoffnung*; and a *Mecklenburgh ſhip* ſhe is in every thing that conſtitutes appearance, whatever may in reality be her national character. The maſter and crew are foreigners, belonging to the North of *Germany*, and the ſhip is furniſhed with the regular *Mecklenburgh* papers. She has, therefore, every appearance of a *Mecklenburgh* ſhip, and there is nothing to rebut the preſumption that ſhe is ſo in point of fact, but the account given by the maſter, who ſays, that the veſſel belongs to Mr. *Coſack* of *Hull*, whom he believes to be a foreigner, but he does not know in what country he was born, or to whom he is a ſubject. The queſtion is, whether, under ſuch circumſtances, I ſhall look farther into the caſe, for the purpoſe of enquiring whether there is any *Britiſh* intereſt in this ſhip, and I am of opinion that it is not neceſſary for me ſo to do. There can be nothing to alarm the jealouſy of the Court in this ambiguous character of the veſſel, becauſe, as to any improper communication, *that* might as effectually be carried on by means of a *Mecklenburgh* as a *Britiſh* ſhip. What might be the reſult of a more prying inveſtigation into the character of this veſſel, it is impoſſible for me to ſay, but I do not feel myſelf called upon to inveſtigate this matter farther. It muſt be underſtood that I do not, in this caſe, intend to decide that a ſhip in fact and in appearance *Britiſh*, would be protected under a licence granted to a *Mecklenburgh ſhip*.—— Ship and cargo reſtored, on payment of captor's expences.

SEDULOUS, MILLS.

March 24th, 1813.

A ſtore ſhip recapturing *Britiſh* property from the enemy, is entitled to an eighth only for ſalvage.

THIS was the caſe of a *Britiſh* ſhip and cargo, which had been taken by a *French* privateer, and recaptured by His Majeſty's ſtore-ſhip *Abundance*. The queſtion was, whether a *ſtore-ſhip* was entitled to one-ſixth or one-eighth only for ſalvage, on the recapture of *Britiſh* property from the hands of the enemy.

JUDGMENT.

Sir *W. Scott*.—This caſe turns upon the interpretation of the Prize Act, ſo far as it relates to ſalvage. By the 7th ſection of the ſtatute it is enacted, " That " if any ſhip, or veſſel, or boat, taken as prize, or " any goods therein, ſhall appear and be approved, in " any Court of Admiralty having a right to take cog- " nizance thereof, to have belonged to any of His " Majeſty's ſubjects of *Great Britain* or *Ireland*, or of " any of the dominions and territories remaining and " continuing under His Majeſty's protection and obe- " dience, which were before taken or ſurprized by " any of His Majeſty's enemies, and at any time " afterwards again ſurprized and retaken *by any of His* " *Majeſty's ſhips of war*, or any privateer, or other " ſhip, veſſel, or boat, under His Majeſty's protection " and obedience, that then ſuch ſhips, veſſels, boats, " and goods, and every ſuch part and parts thereof " as aforeſaid, formerly belonging to ſuch His Ma- " jeſty's ſubjects, ſhall, in all caſes, (ſave in ſuch as " are hereafter excepted,) be adjudged to be reſtored, " and

45 G. 3. c. 72.

The Sedulous.

March 24th, 1813.

" and ſhall be, by the decree of the ſaid Court of " Admiralty, accordingly reſtored to ſuch former " owner or owners, or proprietor or proprietors, he " or they paying for and in lieu of ſalvage, (*if retaken* " *by any of His Majeſty's ſhips or hired armed ſhips,*) " *one-eighth part* of the true value of the ſhips, veſſels, " boats, and goods, reſpectively ſo to be reſtored, " which ſaid ſalvage of one-eighth ſhall be anſwered " and paid to the flag-officers, captains, officers, ſea- " men, marines, and ſoldiers, *in His Majeſty's ſaid* " *ſhip or ſhips of war*, to be divided in ſuch manner " as before in this act is directed, touching the ſhare " of prizes belonging to the flag-officers, captains, " officers, ſeamen, marines, and ſoldiers, where prizes " are taken by any of His Majeſty's ſhips of war; and, " if retaken by any privateer, or other ſhip, veſſel, or " boat, one-ſixth part of the true value," &c. The queſtion is, to which of theſe two rates of ſalvage this ſtore-ſhip ſhall be entitled for the ſervice ſhe has performed. Now, taking the whole clauſe together, I think the ſenſe and meaning of the act is, that the ſmaller ſtate of ſalvage is confined to ſhips of war on the public military eſtabliſhment of the country. It is ſaid, that theſe ſtore-ſhips ought to be put on the ſame footing with revenue cutters, which are entitled to the higher rate of ſalvage; but there is, I think, a clear diſtinction between the two deſcriptions of veſſels. Revenue cutters are not on the military, but the fiſcal eſtabliſhment of the ſtate; and, if they are entitled to make captures from the enemy, it is only in virtue of their letters of marque, by taking which they acknowledge themſelves to be private ſhips of war. The queſtion, then, is reduced to this—Are theſe ſtore-ſhips part of the public military eſtabliſhment of the country?

and

The SEDULOUS.

March 24th, 1813.

and I ſee no reaſon for ſaying that they are not. They are armed at the public expence, are commanded by commiſſioned officers, are rated as ſhips of war, and, bearing that character, are entitled to make captures on their own account. Their primary buſineſs is the conveyance of ſtores, but they are not prohibited from taking prizes. I muſt conſider them as forming part of the military eſtabliſhment of the country, and accordingly pronounce them to be entitled only to the lower ſalvage of an eighth.

APPENDIX.

APPENDIX A.

Order, 31ſt *May* 1809—As to the trade at *Heligoland*.

WHEREAS the Iſland of *Heligoland* ſurrendered to His Majeſty's Forces, and is now in His Majeſty's poſſeſſion; His Majeſty is pleaſed, by and with the advice of His Privy Council, to order, and it is hereby ordered, That the trade to and from *Heligoland* ſhall be confined to *Britiſh* ſhips, navigated according to law, except in caſes where His Majeſty may be pleaſed by His ſpecial licence otherwiſe to permit.

And, for the more effectually preventing any Foreign veſſel carrying on any trade to or from the ſaid iſland, contrary to His Majeſty's will and pleaſure, as by this Order expreſſed; His Majeſty is further pleaſed, by and with the advice of His Privy Council, to order, and it is hereby ordered, That no foreign veſſel, except as before excepted, ſhall enter into the port, harbour, or road lying between the Iſland of *Heligoland* and *Sandy Iſland*, and the ſhoals of the ſaid iſlands reſpectively, and commonly called or known by the names of the North Haven and the South Haven, under any pretence whatever: and that no goods, wares, or merchandize whatſoever, ſhall be in any manner put on ſhore in any part of the ſaid Iſland of *Heligoland*, from any ſuch foreign veſſel, or carried from the ſhore of ſuch iſland to any ſuch foreign veſſel, or in any manner tranſhipped from any ſuch foreign veſſel into any veſſel lying in the ſaid harbour, port, or road, or from any veſſel lying in the ſaid harbour, port or road, into any ſuch foreign veſſel.

And the Right Honourable the Lords Commiſſioners of His Majeſty's Treaſury, and the Lords Commiſſioners of the Admiralty, are to give the neceſſary directions herein as to them may reſpectively appertain.

STEPH. COTTRELL.

APPENDIX B.

Order, 26th *April* 1809.

WHEREAS His Majeſty by His Order in Council of the 11th *November* 1807, was pleaſed, for the reaſons aſſigned therein, to order, that "all the ports and places of *France* and her allies, or of any other country at war with His Majeſty, and all other ports or places in *Europe* from which, although not at war with His Majeſty, the *Britiſh* flag is excluded, and all ports or places in the colonies belonging to His Majeſty's enemies, ſhould from thenceforth be ſubject to the ſame reſtrictions, in point of trade and navigation, as if the ſame were actually blockaded in the moſt ſtrict and rigorous manner;" and alſo to prohibit "all trade in articles which are the produce or manufacture of the ſaid countries or colonies: And whereas His Majeſty having been nevertheleſs deſirous not to ſubject thoſe countries which were in alliance or in amity with His Majeſty, to any greater inconvenience than was abſolutely inſeparable from carrying into effect His Majeſty's juſt determination to counteract the deſigns of His enemies, did make certain exceptions and modifications expreſſed in the ſaid Order of the 11th *November*, and in certain ſubſequent Orders of the 25th of *November*, declaratory of the aforeſaid Order of the 11th of *November*, and of the 18th of *December* 1807, and the 30th of *March* 1808.

And whereas in conſequence of divers events which have taken place ſince the date of the firſt mentioned Order, affecting the relation between *Great Britain* and the territories of other powers, it is expedient that ſundry parts and proviſions of the ſaid Orders ſhould be altered or revoked:—

His Majeſty is therefore pleaſed, by and with the advice of His Privy Council, to revoke and annul the ſaid ſeveral Orders, except as herein-after expreſſed; and ſo much of the ſaid ſeveral Orders, except as aforeſaid, is hereby revoked accordingly.

And His Majeſty is pleaſed, by and with the advice of His Privy Council, to order, and it is hereby ordered, That all the ports and places as far north as the river *Ems* incluſively, under the government ſtyling itſelf the Kingdom of *Holland*, and all ports and places under the government of *France*, together with the colonies, plantations, and ſettlements in the poſſeſſion of thoſe governments reſpectively; and all ports and places in the northern parts of *Italy*, to be reckoned from the ports of *Orbitello* and *Peſaro* incluſively, ſhall continue and be ſubject to the ſame reſtrictions in point of trade and navigation, without any exception

as if the ſame were actually blockaded by His Majeſty's naval forces in the moſt ſtrict and rigorous manner; and that every veſſel *trading* from and to the ſaid countries or colonies, plantations or ſettlements, together with all goods and merchandize on board, ſhall be condemned as prize to the captors.

And His Majeſty is ſurther pleaſed to order, and it is hereby ordered, That this Order ſhall have effect from the day of the date thereof, with reſpect to any ſhip together with its cargo which may be captured ſubſequent to ſuch day, on any voyage which is and ſhall be rendered legal by this Order, although ſuch voyage at the time of the commencement of the ſame was unlawful, and prohibited under the ſaid former Orders; and ſuch ſhips upon being brought in ſhall be releaſed accordingly; and with reſpect to all ſhips, together with their cargoes, which may be captured in any voyage which was permitted under the exceptions of the Orders above mentioned, but which is not permitted according to the proviſions of this Order, His Majeſty is pleaſed to order, and it is hereby ordered, that ſuch ſhips and their cargoes ſhall not be liable to condemnation, unleſs they ſhall have received actual notice of the preſent Order before ſuch capture; or, in default of ſuch notice, until after the expiration of the like intervals from the date of this Order, as were allowed for conſtructive notice in the Orders of the 25th of *November* 1807, and the 18th of *May* 1808, at the ſeveral places and latitudes therein ſpecified.

And the Right Honourable the Lords Commiſſioners of His Majeſty's Treaſury, His Majeſty's Principal Secretaries of State, the Lords Commiſſioners of the Admiralty, and the Judge of the High Court of Admiralty, and Judges of the Court of Vice-Admiralty, are to give the neceſſary directions herein as to them may reſpectively appertain.

STEPH. COTTRELL.

APPENDIX (C.)

TRAITÉ de Paix entre Sa Majeſté le Roi de Suede d'une part, et Sa Majeſté le Roi du Royaume Uni de la Grande Bretagne et de l'Irelande de l'autre, fait et conclu à Orebro le 18 Juillet 1812, et y ratifié le 17 Août et à Carlton Houſe le 4 du même mois.

Treaty of peace between *Great Britain* and *Sweden*.

NOUS Charles par la Grace de Dieu Roi de Suède, des Goths et des Vandales, &c. &c. &c. Héritier de Norvège, Duc de Schleſvig Hollſtein, de Stormarie et de Ditmarſen, Comte d'Olden-

d'Oldenbourg et de Delmenhorſt, &c. &c. ſavoir faiſons: Qu'ayant rencontré chez Son Atteſſe Royale le Prince Régent, au nom et de la part de Sa Majeſté le Roi du Royaume Uni de la Grande Bretagne et de l'Irlande, *une inclination réciproque de mettre fin à la guerre ſurvenue entre notre Royaume et le Royaume Uni de la Grande Bretagne et de l'Irlande*, ainſi que d'entrer en négociation pour la concluſion d'un Traité de Paix et d'Amitié entre les deux Etats; et qu'ayant nominé pour cette effet nos amés et féaux, le Sieur Laurent Baron d'Engeſtröm, un des Seigneurs du Royaume de Suède, Miniſtre d'Etat et des Affaires Etrangères, Chancelier de l'Univerſitié de Lund, Chevalier Commandeur de Nos Ordres, Chevalier de l'Ordre Royal de Charles XIII., Grand Aigle de la Legion d'Honneur de France, et le Sieur Guſtave Baron de Wetterſtedt, Notre Chancelier de la Cour, Commandeur de Notre l'Ordre de l'Etoile Polaire, Un des dix-huit de l'Academie Suedoiſe; tout comme Son Alteſſe Royale, le Prince Régent, au nom et de la part de Sa Majeſté le Roi du Royaume Uni de la Grande Bretagne et de l'Irlande, vient d'y autoriſer de Son Côté, le Sieur Edvard Thornton, Ecuyer; leſquels ont dreſſés, conclú, ſigné, et ſcellé a Orebro le 18 Juillet de la preſent Année un Traité de Paix et d'Amitié portant mot pour mot ce qui ſuit.

In the name of the Moſt Holy and Undivided Trinity.

HIS majeſty the King of the United Kingdom of Great Britain and Ireland, and his majeſty the King of Sweden, being equally animated with the deſire of re-eſtabliſhing the ancient relations of friendſhip and good underſtanding between the two crowns, and between their reſpective ſtates, have named for this purpoſe their plenipotentiaries; that is to ſay, His royal highneſs the Prince Regent, in the name and on the behalf of his majeſty the King of the United Kingdom of Great Britain and Ireland, Edward Thornton Eſquire; and his majeſty the King of Sweden, Lawrence Baron

Au nom de la Très Sainte et Indiviſible Trinité.

SA majeſté le Roi du Royaume Uni de la Grande Bretagne et de l'Irlande, et ſa majeſté le Roi de Suède, également animés du déſir de rétablir les anciennes rélations d'amitié et de bonne correſpondance entre les deux couronnes et entre leurs etats reſpectifs, ont nommé pour cet effet leurs plénipotentiaires; c'eſt à dire, Son alteſſe royale le Prince Régent, au nom et de la part de ſa majeſté le Roi du Royaume Uni de la Grande Bretagne et de l'Irlande, le Sieur Edouard Thornton, Ecuyer; et ſa majeſté le Roi de Suède, le Sieur Laurent Baron d'Engeſtröm, un des ſeigneurs du Royaume

APPENDIX.

Baron d'Engeſtröm, one of the nobles of the kingdom of Sweden, miniſter of ſtate and of foreign affairs, chancellor of the univerſity of Lund, knight and commander of the orders of the King, knight of the royal order of Charles the thirteenth, Grand Eagle of the legion of honour of France; and Guſtavus Baron de Wetterſtedt, chancellor of the court, commander of the order of the Polar Star, one of the eighteen members of the Swediſh academy: the which plenipotentiaries, after having exchanged their full powers, drawn up in full and due form, have agreed upon the following articles:

Royaume de Suède, miniſtre d'etat et des affaires etrangères, chancelier de l'univerſité de Lund, chevalier et commandeur des ordres du Roi, chevalier de l'ordre royal de Charles treize, Grand-Aigle de la légion d'honneur de France; et le Sieur Guſtave Baron de Wetterſtedt, chancelier de la cour, commandeur de l'ordre de l'Etoile Polaire, un des dix huit de l'Académie Suédoiſe; leſquels plénipotentiaires, après avoir échangés leurs pleinpouvoirs, dreſſés en pleine et düe forme, ſont convenus des articles ſuivans:

Article I.

There ſhall be between their majeſties the King of the United Kingdom of Great Britain and Ireland, and the King of Sweden, their heirs and ſucceſſors, and between their ſubjects, kingdoms, and reſpective ſtates, a firm, true, and inviolable peace, and a ſincere and perfect union and friendſhip, ſo that from this moment every cauſe of miſunderſtanding which may have exiſted between them ſhall be regarded as entirely ceaſing and done away.

Article I.

Il y aura entre leurs majeſtés, le Roi du Royaume Uni de la Grande Bretagne et de l'Irlande, et le Roi de Suède, leurs héritiers et ſucceſſeurs, et entre leurs ſujets, royaumes, et états reſpectifs, une ferme, vraie, et inviolable paix, et une ſincère et parfaite union et amitié, de ſorte que dès ce moment tout ſujet de mèsintelligence, qui ait pû ſubſiſter entr' elles, ſera regardé comme entièrement ceſſant et détruit.

Article II.

The relations of friendſhip and commerce between the two kingdoms ſhall be re-eſtabliſhed upon the footing on which they ſtood on the 1ſt day of January 1791; and all the treaties and conventions

Article II.

Les rélations d'amitié et de commerce entre les deux pays, séront rétablies ſur le pied où elles étoient au premier our de Janvier 1791, et tous les traités et les conventions ſubſiſtant entre les

conventions ſubſiſting between the two countries at that epoch ſhall be regarded as renewed and confirmed, and they are, by the preſent treaty, renewed and confirmed accordingly.

ARTICLE III.

If in reſentment of the preſent pacification, and the reeſtabliſhment of good underſtanding between the two countries, any power whatſoever ſhall make war upon Sweden, his majeſty the King of the United Kingdom of Great Britain and Ireland engages to take meaſures, in concert with his majeſty the King of Sweden, for the ſecurity and independence of his ſtates.

ARTICLE IV.

The preſent treaty ſhall be ratified by the two high contracting parties, and the ratifications ſhall be exchanged within ſix weeks, or ſooner, if poſſible.

In faith whereof, we the underſigned, in virtue of our full powers, have ſigned the preſent treaty, and have fixed thereto the ſeal of our arms.

Done at Orebro, the eighteenth day of the month of July, in the year of our Lord one thouſand eight hundred and twelve.

The Baron d'Engeſtrom.
(L.S.)

Edw. Thornton.
(L.S.)

G. Baron de Wetterſtedt.
(L.S.)

les deux états à cette époque, ſeront regardés comme renouvellés et confirmés, et ſont ainſi, par le préſent traité, renouvellés et confirmés.

ARTICLE III.

Si en hain de la pacification préſente, et du rétabliſſement de la bonne correſpondance entre les deux pays, quelque puiſſance que ce ſoit fait la guerre à la Suède, ſa Majeſté le Roi du Royaume uni de la Grande Bretagne et d'Irlande, s'engage de prendre des mesures de concert avec ſa majeſté le Roi de Suède, pour la fureté et pour l'indépendance de ſes états.

ARTICLE IV.

Le préſent traité ſera ratifié par les deux Hautes Parties Contractantes, et les ratifications en ſeront échangées en ſix ſemaines, ou plutôt ſi faire ſe peut.

En foi de quoi, nous ſouſſignés, en vertu de nos pleinpouvoirs, avons ſigné le préſent traité, et l'avons muni du cachet de nos armes.

Fait à Orebro le dix huitième jour du mois de Juillet, l'an de grace, mil huit cent et douze.

Le Baron d'Engeſtrom.
(L.S.)

Edw. Thornton.
(L.S.)

G. Baron de Wetterſtedt.
(L.S.)

A ces

APPENDIX.

A ces cauſes nous avons voulus ratifier, approuver et accepter ce Traité de Paix et d'Amitié avec tous ſes articles, points et clauſes, tels qu'ils ſont inſérés ici mot pour mot, comme par la préſent nous le ratifions, approuvons et acceptons, de la maniere la plus efficace que faire ſe peut, voulons et promettons de tenir et de remplir ſincerement, fidelement et loyalement ce que contient et dicte le dit Traité de Paix et d'Amitié, et tous ſes articles, points et clauſes. En foi de quoi nous avons ſigné la preſente de notre propre main et y avons fait attacher notre Grande Sceau Royal, fait a notre Chateau d'Orebro le dix-ſeptieme jour d'Août l'an de grace mil huit cent douze.

CHARLES, (L.S.)

LAURENT d'ENGESTRÖM.

Ratification of the aforeſaid Treaty of Peace by His Royal Highneſs the Prince Regent of the United Kingdom of *Great Britain* and *Ireland*, in the name and on the behalf of His Majeſty.

GEORGE the Third, by the grace of God, of the United Kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, Duke of *Brunſwick* and *Lunenburgh*, Arch-Treaſurer and Prince Elector of the Holy *Roman* Empire, &c. To all and ſingular to whom theſe preſents ſhall come, greeting: Whereas a treaty of peace, union, and friendſhip, between His Majeſty and his good Brother the King of *Sweden*, was concluded and ſigned at *Orebro* on the eighteenth day of *July* one thouſand eight hundred and twelve, by the plenipotentiaries of His Majeſty and of his ſaid good Brother, duly and reſpectively authorized for that purpoſe; which treaty is word for word, as follows:

(Inſeratur.)

We having ſeen and conſidered the treaty aforeſaid, have, in the name and on the behalf of His Majeſty, approved, ratified, and confirmed the ſame in all and every one of its articles and clauſes, as we do by theſe preſents approve, ratify, accept, and confirm it, for His Majeſty, his heirs and ſucceſſors, engaging and promiſing upon our word, that we will ſincerely and faithfully perform and obſerve all and ſingular the things which are contained and expreſſed in the aforeſaid treaty; and we will never

ſuffer

ſuffer the ſame to be violated by any one, or tranſgreſſed in any manner, as far as it lies in our power. For the greater teſtimony and validity of all which, we have, in the name and on the behalf of His Majeſty, cauſed the Great Seal of *Great Britain* to be affixed to theſe preſents, which we have ſigned with our hand. Given at our palace at *Carlton Houſe*, the fourth day of *Auguſt* in the year of our Lord one thouſand eight hundred and twelve, and of His Majeſty's reign the fifty-ſecond.

In the name and on the behalf of His Majeſty,

GEORGE P. R.

Printed by A. Strahan, Law-Printer to His Majeſty,
Printers-Street, London.

REPORTS

OF

CASES

DETERMINED IN THE

HIGH COURT OF ADMIRALTY,

&c. &c. &c.

MANLY, HANSEN.

May 12th 1813.

THIS ſhip, under *Daniſh* colours, laden with a cargo of tobacco, cotton, timber, and other goods, was captured on the 21ſt of *March* 1813, whilſt in the proſecution of a voyage from *Chriſtianſand* to *Leith*. There was a licence on board permitting the veſſel to bring a cargo from *Chriſtianſand* to *Dublin*, on condition that ſhe ſhould ſail *North-about*; but it was admitted in the claim that ſhe was ſteering for *Leith* at the time of capture, and that it was intended to have delivered her cargo there, if permiſſion could have been obtained for that purpoſe; otherwiſe, that the veſſel was to have proceeded with her cargo to *Dublin*. The queſtion was, whether the deviation to *Leith* was ſuch a violation of the conditions of the licence as would ſubject the ſhip and cargo to condemnation.

A licence to one port of the United Kingdom will not protect a voyage to another port.

The Manly. — May 12th, 1813.

JUDGMENT.

Sir *W. Scott.*—This ſhip and cargo, both of them enemy's property, and belonging to the ſame perſons, were coming with an undiſputed deſtination to *Leith*, and with an intention, if poſſible, to diſpoſe of the cargo at that port, for ſuch I think is the fair interpretation of the affidavit of Mr. *Morch*, the ſon of the owner of this ſhip and cargo. He ſays, "that he "arrived in *Leith* on the 13th of *October* laſt, from "*Chriſtianſand*, for the purpoſes of trade and of "attending to the concerns of his father in *Great* "*Britain*, where he has remained ever ſince: that "he has had conſiderable correſpondence with his "father's houſe, and with his brother, *Peder Morch*, "who alſo acts for and ſuperintends the buſineſs of "his father reſpecting ſhipments by the *Manly*; that "he was informed by his brother that his father had "ſome intention of importing cotton-wool into this "country, provided ſuch goods were permitted by "law to be imported; that in conſequence thereof "he communicated the circumſtance to Meſſrs. *Cor-*
"*bett, Borthwick*, and Co. Merchants, in *Leith*, the "agents and correſpondents of his father, who having "cauſed particular enquiries to be made at the Cuſtom "Houſes of *London* and *Leith*, he was by them in- "formed that it was learned from both Cuſtom Houſes "that cotton-wool could be imported, and would "be admitted to entry, coming from *Norway*, as "goods permitted by law to be imported; that he "alſo applied perſonally at the Cuſtom Houſe at "*Leith*, where he was informed that cotton-wool was "importable as goods permitted by law, and under "date of the 23d of *February* laſt, he wrote his fa- "ther, *It is ſaid at the* Leith *Cuſtom Houſe that they*

" *apprehend of no difficulty for the* Manly *to return here* " *with cotton.*" There was then, it ſhould ſeem, a clear intention of importing this cotton into *Leith*. He ſays that, " as he was uncertain whether his father " would ſhip cotton, and as the other articles of export " from *Chriſtianſand* would not find a good market " at *Leith*, it was deſirable to get ſuch a licence as " would enable the veſſel to ſail for another port, if " neceſſary." There can be no doubt, therefore, that if the cargo conſiſted of cotton, it was to be brought to *Leith* for importation; and the queſtion is, whether a tranſaction of this kind is protected by the licence.

The ſhip and cargo are both of them enemy's property, and there is no propoſition more univerſally admitted than that an enemy has no right to trade with the ports of this country, except by a ſpecial Permiſſion of the Government, and that he muſt comply ſtrictly with the conditions under which that permiſſion is granted. No voluntary deviation from the courſe pointed out can be on any account tolerated, and the only excuſe that can be allowed for a departure from the terms preſcribed is, that it was done under the preſſure of an irreſiſtible neceſſity. Where the party is not within the terms of the licence, the character of enemy revives, and the property of an enemy is ſubject to confiſcation according to the laws of all civilized ſtates.

The licence permits the veſſel to go to *Dublin*, ſailing *North-about*, and the fact is that ſhe was going to *Leith*, there to depoſit her cargo. Now I aſk, whether it is poſſible to apply ſuch a licence to ſuch a voyage. What is the duty of a merchant, reſident in a hoſtile country, who wiſhes to trade with the ports of this kingdom? Why, undoubtedly, to ſtate to the Government, in the moſt full and explicit man-

The MANLY.

May 12th, 1815.

ner, the purpoſe of his voyage, and the place to which he intends to go; and it is then for His Majeſty's government, being put in poſſeſſion of the plan and deſign of the party, to decide whether it will permit ſuch a courſe of proceeding. But to come with a repreſentation of one kind, and to apply the licence obtained under that repreſentation to the protection of a tranſaction totally different, can never, as it appears to me, be permitted. Such a courſe of proceeding muſt of neceſſity render the licence inoperative for the purpoſe to which it is applied. Mr. *Morch* applies to Meſſrs. *Corbett*, *Borthwick*, and Co. of *Leith*, who are perſons of great experience in the trade between *Norway* and this country, and they tell him, "that it was very uſual "for ſhips under licences to different ports in *England* "and *Ireland*, to touch at *Leith*, and when thought "adviſable, the cargoes were permitted by the Board "of Cuſtoms to be diſcharged at *Leith*, notwithſtanding another port being named in the licence; that "the ſaid *Corbett*, *Borthwick*, and Co. therefore recommended application being made for a licence "for the *Manly*, for *Dublin*, where deals and logs "would ſell to advantage, if cotton ſhould not be "ſhipped, ſo as to require the diſcharge at *Leith*, and "which would at any rate enable his father to ſend "the veſſel either to *Dublin* or *Leith*." This appears to me to be tantamount to ſaying that a licence for one port is good for all others, for I ſee no limitation; if it is to be deemed good for one other port, it muſt be equally ſo for every other port. *Leith* has no peculiar privilege, and is entitled to no advantages over any other place of trade. If the parties are at liberty under ſuch a licence to go to *Leith*, then why not to *Newcaſtle* or *Yarmouth*, or indeed to any other port of the United Kingdom?

The MANLY.

May 12th, 1813.

Kingdom? Is this the tranſaction diſcloſed to Government, and for which it iſſued its permiſſion and directions? I think not. Application was made to the Privy Council to permit the enemy to trade with one of the ports of this country, and, under the permiſſion ſo obtained, the parties think proper to trade with another, and a diſtant port, very differently circumſtanced, and in a different and diſtinct part of the United Kingdom. To permit ſuch a departure from the terms of the licence, would be to throw open not one port only, but all the ports of His Majeſty's dominions to the enemy. Is that the way in which the trade of the country can with any ſafety be carried on in time of war? It appears to me to be quite incompatible with that vigilance and control which the Government is bound to exerciſe over the trade of the enemy with its own ſubjects. A licence can never have any ſuch unlimited effect, but muſt be confined to the port for which it was eſpecially granted, or at leaſt to one nearly allied and contiguous to it. If the parties want further liberty, they ſhould ſo ſtate it in their petition to the Privy Council; as, in the preſent caſe, they ought to have applied for a licence to *Dublin*, with permiſſion to touch at *Leith*; and when once the ſhip had arrived in that port, a further application might have been made for leave to land the cargo there, which would probably, as in other caſes, have been granted. I think it is impoſſible to ſay that the preſent tranſaction is not a different one from that for which the licence was granted. The licence is to go to *Dublin*, and the ſhip is taken on a voyage to *Leith*, without any intention of going to *Dublin* at all, unleſs permiſſion to unload at *Leith* is refuſed. The tranſaction therefore is different from that which was

The MANLY.

May 12th, 1813.

represented to Government, and for the protection of which it issued its *fiat*. The present case appears to me to bear no analogy to the cases* which have been cited. Those were cases of ships coming to this country under the wish, rather than the intention, of the owners that they should proceed further, and which were acting in conformity to the terms of their licences, and were in the permitted branch of their voyage at the time when they were captured. Such was the case of the *Henrietta*, and the others which have been mentioned. But here the circumstances are altogether different: here is so entire a deviation both as to port and course, that I do not think it is in the power of this Court to carry the construction of the licence to the extent that is prayed. I do not say that there is any *mala fides* in these parties; but there is a strange misconception or misconstruction of the information, which I should not have expected from such a source. How such a notion could have entered the minds of gentlemen of commercial experience, is not distinctly explained. But whether the mistake has arisen from the ignorance of the person giving the information, or the misapprehension of the person receiving it, the event must still be the same. The Court cannot divest the captor of a right which he has acquired by the detention of a ship so denuded of all protection from the licence under which she is claimed. Where the parties have been acting under honest but erroneous impres-

---

* *Henrietta, Torbiornsen*—*Edwards*, 363; *Emma, Malgreen*—*ibid*, 366; *Gute Hensight*—16th *June* 1812: in this last case, the ship was permitted by the licence to touch at *Leith* for convoy, but went with the intention of landing the cargo there, if permission could be obtained.

sions,

The MANLY.

May 12th, 1813.

ſions, one may feel a repugnance to follow up their miſtakes with conſequences ſo detrimental to them, as the confiſcation of their property. But though they may have been intentionally, ſtill they may not have been legally, innocent. The only queſtion which the Court has to decide, is, whether this ſhip, belonging to an enemy, is protected by the licence which ſhe had on board, and I am of opinion that ſhe is not. The licence is to *Dublin*, *North-about*, and the ſhip was going to *Leith*, a place not named in the licence, or connected with that which is named, and to be reached by a courſe totally different from that indicated. I feel myſelf therefore under the neceſſity of pronouncing a ſentence of condemnation.

DEMARARA and its Dependencies.

May 12th, 1813.

THIS was a queſtion reſpecting certain Slaves, which were taken at *Demarara*, on the 21ſt of *September* 1803, when that colony and its dependencies, with the arſenals, forts, and batteries, ſurrendered to His Majeſty's land and ſea forces, under the command of General *Grinfield* and Commodore *Hood*. The ordinance, arms, artillery, and ſtores, were long ſince condemned as prize. The captors now prayed condemnation of three hundred and ninety-nine ſlaves, one hundred and ninety-nine of whom were employed in the public works of the colony, and the other two hundred attached to the *Louiſberg* eſtate, which had formerly been the property of the Prince of *Orange*, but was afterwards confiſcated by the *Dutch* government.

Where there is no poſitive Regulation to the contrary, *ſlaves* are deemed *perſonal property*, and paſs to the captors under the words of the Prize Act, "Goods or Merchandize."

DEMARARA and its Dependencies.

May 12th, 1813.

JUDGMENT.

Sir *W. Scott*.—In this caſe the Court is called upon to decide reſpecting certain ſlaves taken at the *Dutch* ſettlement of *Demarara*. The ſlaves are in number three hundred and ninety-nine, of whom, two hundred are no longer the ſubject of conteſt, but are now admitted to have belonged to the eſtate on which they were employed as *glebæ aſcriptitii*: they were attached to the ſoil as part and parcel of the realty, and upon that account, the queſtion, with reſpect to them, has very properly been given up by the captors.

The attention of the Court has however been called to the caſe of the one hundred and ninety-nine ſlaves, who were employed by the *Dutch* government upon the public works in the military arſenals of the ſettlement.

The firſt queſtion is, whether ſlaves are at all given to the captors by the Prize Act, *i. e.* whether they paſs by the words "ſtores of war, goods, "merchandize, or treaſure," which, by the third ſection of the ſtatute, are to be deemed prize, and to be apportioned by His Majeſty between the army and navy, when acting in conjunction. Now the fact is, that ſlaves have generally been conſidered as perſonal property. The word *mancipia*, as it has been well obſerved, ſignifies *quæ manu capiuntur*. This is unqueſtionably the meaning of the word according to the civil law. In our *Weſt India* colonies, where ſlavery is continued, and is likely to continue longer than in any of the countries of *Europe*, ſlaves have been for ſome purpoſes conſidered as *real* property; but I apprehend that, where the contrary is not ſhewn, the general character and deſcription of them is, that they are *perſonal* property, and I ſee no

45 G. 3. c. 72. §. 3.

reaſon

reaſon in the preſent caſe for ſaying that they are not within the general rule, and conſequently that they are not to be conſidered as "goods or merchandize." They are liable to be transferred by purchaſe and ſale, and although the owner may chooſe to employ them on his own works inſtead of transferring them for a valuable conſideration, they are not, I apprehend, the leſs "goods and merchandize" on that account. The very ſame obſervation applies to all other caſes of perſonal property, for all ſuch property, if ſaleable, is merchandize, although the perſon in poſſeſſion may not be a merchant or mean to diſpoſe of it by ſale.

In what light are theſe particular ſlaves, employed in the military arſenals of the colony, to be viewed? Are they to be conſidered as *glebæ aſcriptitii* attached indiſſolubly to the public works, or were they liable to be ſold ſeparate and diſtinct, whenever the *Dutch* government might have thought fit ſo to diſpoſe of them? Upon this ſubject the Court is left pretty much in the dark; but, as I before obſerved, ſlaves are, generally ſpeaking, to be deemed perſonal property, and it is only by virtue of poſitive regulation that they are taken out of that deſcription of property, and are otherwiſe to be conſidered. There is nothing in the evidence now before me to ſhew that any act has been done reſpecting theſe ſlaves to produce a departure from their original character. When the *Dutch* Government took poſſeſſion of the *Louiſberg* eſtate, it is to be preſumed that It did ſo exactly in the ſame manner that an individual would have done; but not ſo with reſpect to the public arſenal, for that is a ſpecies of property differing very materially from an eſtate in land, and inſtituted for very different purpoſes. *Non conſtat* that rules relating to private farms ſhould be applicable to public arſenals.

It

DEMARARA and its Dependencies.

May 12th, 1813.

It is probable that ſlaves are connected by much ſlighter ties to the one than to the other. The general rule muſt prevail, unleſs ſome ground of exception be ſhewn. *Stabitur præſumptioni*, unleſs ſome reaſon to the contrary be adduced. In this caſe I ſee nothing of the kind made out in evidence, and therefore I pronounce theſe ſlaves, which were employed in the public arſenals of the enemy, to be good and lawful prize to the captors.

June 2d, 1813.

FREDERICK, BODOM, Maſter.

Alien enemies may ſue in the courts of this kingdom for wages earned on a voyage to this country, under the protection of a *Britiſh* licence.

THIS was a ſuit for wages brought by three of the mariners who had aſſiſted in navigating this veſſel, which, though diſguiſed as *American*, was in reality, *Britiſh* property, from *London* to *St. Peterſburgh* and back, under the protection of a *Britiſh* licence. An appearance was given under proteſt, firſt for the owner, and afterwards, upon his becoming bankrupt, for the bail, and the demand of the mariners was reſiſted on the ground that they had, by the ſubſequent intervention of hoſtilities with *America*, become alien enemies, and were therefore incapable of ſuing in the Courts of this country.

In ſupport of the proteſt, *Luſhington* contended that theſe men, by their own deſcription of themſelves as *Americans*, and conſequently alien enemies, were, incapable of ſuing for the benefit and Protection of the laws of this country. That it was equally clear they could derive no privilege from the licence, becauſe That was granted long before the war with *America* took

took place; and that it could not be fuppofed the *Britiſh* government meant to extend the Protection of the licence ſo far as to enable them to become ſuitors in a *Britiſh* court of juſtice, after hoſtilities had actually commenced between *Great Britain* and their own Country. *Brandon* v. *Neſbit*, (6 *T. R.* 23.) *Briſtow* v. *Tower*, (*ibid.* 35.) *Kenſington* v. *Inglis*, (8 *Eaſt*, 290.) *Conway* v. *Gray*, (10 *Eaſt*, 536.)

For the Mariners, *Swabey*.—The wages were earned and the ſuit commenced when the parties were alien friends, and not enemies; and the men having acted under the faith of a *Britiſh* licence and faithfully diſcharged their duty towards the owner, are entitled to receive their ſtipulated reward. The protection of theſe men, in the event of hoſtilities, muſt have been in the contemplation of the *Britiſh* Government, ſince the terms of the licence authoriſe the maſter to depart with his crew to any, even a hoſtile port, provided it is not in a ſtate of blockade. The licence, permitting the men to ſail on this voyage, neceſſarily implies, a licence to ſue for the wages earned on the voyage. *Sparenburgh* v. *Banatyne*, (1ſt *Boſ.* and *Pul.* 163.) *Wells* v. *Williams*, (1ſt Lord *Raymond*, 282.) *Uſparica* v. *Noble*, (13 *Eaſt*, 332.) *Vrow Mina*, *Behrens*, (page 234.)

JUDGMENT.

Sir *W. Scott*.—I am by no means inclined to ſuſtain the objection which has been taken on the part of the owner, who has derived great advantage from the labour of theſe men, and now, againſt all juſtice and conſcience, refuſes to pay them the ſtipulated reward for their ſervices.

What are the facts of the caſe? Why, that this veſſel, ſailing under *American* colours, but known by all

The Frederick.

June 2d, 1813.

all the parties concerned to be in reality *Britiſh* property, was navigated by theſe men to *St. Peterſburgh*, and back again to this country, under the protection of a *Britiſh* licence. Being diſguiſed as an *American* ſhip, it became neceſſary that ſhe ſhould be manned by a crew entitled in appearance at leaſt to an *American* character, and for that purpoſe the parties now before the Court were engaged by the owner. It does not appear with certainty that they are *American* citizens either by certificate or nativity: it is true that they deſcribe themſelves as ſuch, but that may have been a mere pretence, and the *American* character may have been aſſumed by them for the purpoſe of more effectually diſguiſing that of the ſhip. If they have even been admitted citizens of *America*, of which fact there is no proof before the Court, they may ſtill be *Britiſh*-born ſubjects. Is it for the owner, wiſhing to dreſs up his ſhip as an *American*, to hire theſe perſons, ſuppoſed to be *Americans*, and then to take advantage of their national character for the purpoſe of reſiſting the payment of their juſt demands? Is it for him, having availed himſelf of their ſervices, to turn round upon them and ſay, you are *Americans* and enemies, and as ſuch not permitted to ſue in the courts of this kingdom, and therefore I will withhold from you the reward to which you are ſo juſtly entitled? I do not think it is competent to him to aver their *American* character for the purpoſe of reſiſting the payment of their wages, after he has himſelf obtained from Government permiſſion to diſguiſe his ſhip as *American*; and the protection is ſtill further continued, by permitting the ſhip to proceed to any hoſtile port not blockaded. The oppoſition of the owner is manifeſtly unjuſt, and it would be contrary to all equity to ſuffer

suffer him to aver againſt the rights of theſe perſons ſo acquired. I ſhall therefore overrule the proteſt with coſts, and aſſign the parties to appear abſolutely.

The FREDERICK.

June 2d, 1813.

DRIE VRIENDEN, CASSENS,

June 2d, 1813.

THIS was the caſe of a *Pruſſian* ſhip laden with a cargo of ſalt, and captured on the 11th of *May* 1813, whilſt in the proſecution of a voyage from *St. Martin's* in the Iſle of *Rhé*, to *Pillau* in *Pruſſia*. The veſſel had ſailed under a *Britiſh* licence to *Rochelle*, and had there taken on board a cargo of wine, brandy, and fruit, with which ſhe was to have proceeded to *London*; but having been prevented by unavoidable accidents from ſailing before the expiration of the licence, the cargo was re-landed, and the ſhip proceeded in ballaſt to *St. Martin's*. The maſter ſtated that he ſailed from *St. Martin's* on the preſent voyage, in conſequence of a rumour that hoſtilities were about to take place between *Pruſſia* and *France*, and that he took the ſalt on board in order to obtain a clearance, not being permitted to ſail from a *French* port in ballaſt.

A neutral ſhip coming out of a blockaded port in conſequence of a rumour that hoſtilities were likely to take place between the enemy and the country to which the veſſel belongs, is not liable to condemnation, though laden with a cargo, where the regulations of the enemy would not permit a departure in ballaſt.

For the Captors.—*The King's Advocate* and *Daubeney* contended for condemnation on the ground of breach of blockade.

For the Claimant.—*Jenner* and *Luſhington* argued, that the entrance of this ſhip into a blockaded port of *France*

The Drie Vrienden.

June 2d, 1813.

France was perfectly legal under the protection of the *British* licence; that she was engaged in the commerce of this country, and that she would actually have brought a cargo to the port of *London* in conformity to the terms of her licence, if unavoidable accidents had not intervened. That the conduct of the master, in withdrawing the vessel from the port of the enemy, in which she must have become subject to confiscation, was not only justifiable but laudable. That he was compelled by the *French* regulations to take some cargo on board, and was to be excused on the ground of necessity.

In reply, it was said that this could not be considered as a mere withdrawing the ship from *French* confiscation—that the parties had, by the act of taking a cargo on board, lent themselves to the commerce of the enemy, and were therefore not entitled to any favor.

Court.—I shall restore the ship—the cargo must of course be condemned, though put on board against the will of the master*.

---

* But the danger of seizure and confiscation by the enemy must be immediate and pressing. That the mere apprehension of possible and remote danger will not justify parties in bringing a cargo out of a blockaded port, appears from the decision of the Court in the case of the *Wasser Hundt, Lorentzen.*

That was the case of a *Danish* ship, with a cargo of colonial produce, captured on a voyage from *Kiel* to *Wismar.* The goods belonged to *American* citizens, and had been brought in the first instance from *New York* to *Kiel,* where they were re-shipped and forwarded on the present voyage to *Wismar,* on account of an alarm asserted to have prevailed at *Kiel,* that the *French* were about to seize and confiscate all the colonial produce that might be found in that port.

JUDGMENT.

JUDGMENT.

The DRIE VRIENDEN,

June 2d, 1813.
October 28th, 1810.

As theſe goods were going on a voyage from *Kiel* to *Wiſmar*, they muſt be ſuppoſed to be going for the general purpoſes of trade at the port to which they were deſtined, and, conſequently, they fall within the operation of the order of the 7th of *January* 1807. A party can never be permitted to aver, that he is ſending them thither with any other view than the diſpoſal of them in the common courſe of mercantile tranſactions; but it has been urged that here are circumſtances ſtated in the atteſtation of Mr. *Smith*, which ſhew that there was no final importation at *Kiel*; and that under the peculiar circumſtances of the caſe, theſe goods are to be conſidered as proceeding to *Wiſmar* on a continuous voyage from *New York*. Mr *Smith*, in his affidavit, ſtates that theſe goods were imported into *Kiel* in the month of *June* laſt, and that he cauſed them to be reſhipped and ſent on to *Wiſmar*. Now, this I think, but ill ſupports the aſſertion of a continuous voyage from *New York* to *Wiſmar*. The affidavit ſets out with declaring that theſe goods were imported into *Kiel*, and therefore negatives the ſuggeſtion that there was originally an intention to ſend them forward. It has been argued that there is nothing to ſhew that the duties were paid at *Kiel*, or that there was any intention of ſelling the goods at that place; but although it is not ſhewn that the duties were paid, the fact of payment is not denied, and if the goods were landed, the unavoidable preſumption is, that the duties were paid as in other caſes of importation, and this preſumption is the ſtronger, as there was at the time no intention of ſending them on to *Wiſmar*. That the goods were afterwards exported, does not make it leſs an importation. It is not to be ſuppoſed that all the goods landed at *Kiel* are in all caſes conſumed there. The queſtion then comes to this, Whether the goods can be protected on the voyage from *Kiel* to *Wiſmar* by the circumſtances which the party has ſtated. Now, what are theſe circumſtances? Firſt, that "the "goods are *bonâ fide American* property;" why that can impart no protection to them, if they were captured on an illegal voyage: then, that they were removed from apprehenſion of *French* invaſion. Mr. *Smith* ſays, "That the only reaſon of his moving the ſaid "goods from *Kiel* to *Wiſmar* aforeſaid, was the deponent's great "apprehenſion, from the *French* aſſembling ſuch a number of "troops in this quarter, that it was their ſerious intention to enter "*Holſtein* and ſeize all *American* property and colonial produce, as "they had done in *Spain* and *Holland*." Will political and remote ſpeculations of this kind give the parties a right to violate the

Orders

The Drie Vrienden.

June 2d, 1813.

Orders in Council? If theſe apprehenſions, ſo entertained and ſo extended to remote conſequences, are to authorize the violation of a blockade, one does not ſee how any blockade is to be ſupported. There was no actual perſecution in the caſe; but the party ſmells danger at a diſtance, and ſatisfies himſelf that the *French* army was aſſembled for no other purpoſe than to ſeize *American* property. But ſuppoſe his apprehenſions were well founded, would that juſtify his violating the rights of another country? Certainly not. He is to rely on his neutrality, and to look to his own Government for protection. That the *French* in this apprehended march, this creature of his own imagination, might have been guilty of exceſſes, can give him no right to ſhove aſide the *Britiſh* Order in Council. Then it has been ſaid that he acted without orders from the *American* owners, and that they had no intention of invading the rights of this country. But the *Britiſh* orders *are* violated, and you cannot diſtinguiſh the intention from the fact. It is done *by them* if it is done *by him*, for nothing can be more certain than that the act of the agent is the act of the principal. It is a trading for which the *Britiſh* Orders in Council ſubject the property to confiſcation, and as the excuſes ſet up furniſh no ground whatever for exemption, I muſt pronounce this ſhip and cargo ſubject to condemnation.

LA YSABEL, Bozo.

February 25th, 1812.

The maſter has a right to hypothecate the ſhip and cargo though lying in a port of the ſame country in which the owners reſide, provided he has no means of communicating with the owners.

THIS was a caſe of a *Spaniſh* ſhip, which, in the proſecution of a voyage from *Alicant* to *London*, with a cargo of wool and cocoa, met with ſevere gales of wind, and was obliged to put into the port of *Corunna* to repair the damage ſhe had ſuſtained. The maſter, being in want of money to defray the charges of repairing the veſſel, and having unſucceſsfuly tried other means to obtain it, applied to *Don Juan Bamptiſta De Lanagoiti*, of *Corunna*, his Catholic Majeſty's conſul at that place, who ſupplied him from time to time with different ſums to the amount of 169,889 rials of Vellon, which, it was ſtated, the maſter endeavoured to find the means of repaying, by renewing his applications for money to other perſons at *Corunna*; but, proving again unſucceſsful, he granted a bottomree-bond, dated 10th *May*, 1811, to *Lanagoiti*, for the money advanced by him, at the rate of 45 per cent. for one year, upon the ſhip, her freight, tackle, apparel, and furniture. The ſhip ſailed from *Corunna* in *May*, and arrived in the port of *London* with her cargo on the 18th of *June*. The validity of the bond was now conteſted.

JUDGMENT.

Sir *W. Scott*.—This bond is given for a ſum of money aſſerted to have been advanced for the repairs of the ſhip, and the ſecurity of the cargo. What the maſter ſtates in his affidavit is this, that being on a

La Ysabel. February 25th, 1812.

voyage from *Alicant* to *London*, the ſhip received damage and was obliged to put into *Corunna*, and that after trying other means to procure money, he at length applied to *Don Juan Bamptiſta Lanagoiti*, his Catholic Majeſty's conſul there, (which, if the authority of conſul were neceſſary, the Court would hold to be ſufficient) for the neceſſary advances for the uſe of the ſhip and cargo, and that *Lanagoiti* at his earneſt and urgent requeſt granted him what he ſtood in need of. The money therefore was moſt certainly advanced for the neceſſity of the ſhip and cargo in a place where the maſter was unknown, and without credit.

Now, what are the grounds on which the validity of this bond are conteſted? Why, in the firſt place it is ſaid, that the maſter has no right to hypothecate his ſhip and cargo except in a foreign country, and that the preſent tranſaction took place within the limits of the kingdom in which the owners reſided: But it was not in the ſame province of that diſtracted kingdom that the tranſaction took place, nor could the maſter under the circumſtances in which he was placed have applied to his owners for aſſiſtance. If indeed he had had an opportunity of correſponding with the owners, it would have been his duty ſo to have done, and I ſhould under ſuch circumſtances, have held him not to have been in that ſtate of extreme neceſſity in which alone the law allows to the maſter the power of hypothecation. It is true that it is uſually required as a condition neceſſary to the validity of bonds of this kind, that they ſhould be executed in a foreign port; but the law does not look to the mere locality of the tranſaction. The validity or invalidity of the bond does not reſt on that circumſtance only, but upon the extreme difficulty of communication

nication between the maſter and his owners. Occaſions may ariſe in which the different ports of the ſame kingdom may be as much ſeparated, and cut off from all communication with each other, as if they were ſituated in the moſt diſtant ports of the globe, and ſuch was the caſe with reſpect to the different ports of *Spain* at the time when this tranſaction took place. The difficulty of communication was in fact greater than if the ſhip had been in a foreign port, for the interruption of correſpondence between the different parts of *Spain* was as far as poſſible complete, and if the policy of the law in allowing this authority to the maſter to hypothecate his ſhip and cargo is founded on the extreme difficulty of communication with his owners, there is no reaſon for ſaying that there was not abundance of difficulty to authorize him to do ſo in the preſent inſtance. In the condition in which *Spain* then ſtood, it is but equitable to apply to the different ports of that kingdom, the ſame conſiderations that are uſually applied to ſeparate and diſtinct kingdoms, and I am therefore of opinion, that the bond is not to be deemed invalid upon this ground.

Nor do I think that the bond is to be conſidered void, becauſe the maſter did not communicate with the conſignee in *London*. It is not an obligation of univerſal neceſſity, ſubject to no exception, at leaſt I am not aware that it has been ever ſo held, that the maſter ſhould ſend to the conſignee of the cargo, and take his direction as to the ſteps he ſhould purſue. He was in a foreign port at a diſtance from the conſignee, and an application to him muſt at ſuch a criſis as this was have occaſioned great delay and inconvenience, without perhaps being productive of any advantage. There is no proof

LA YSABEL. February 25th, 1812.

in this case that the master did not actually apply to the consignee for his assistance. He says that *he tried other means* to obtain the money before he applied to *Lanagoiti*, and it is not impossible that an application to the consignee might be amongst the means by which he attempted to extricate himself from his difficulties. Neither is the validity of the bond affected by the circumstance, that the money was advanced before the bond was given, for it is not necessary to the validity of bonds of this kind, that they should be entered into at the precise time when the loan takes place; it is sufficient that it was the understanding of the parties at the time that the money should be secured by means of bottomree, and then it is of no consequence whether the money was advanced at once, and the bond immediately entered into, or whether the master received it from time to time in different sums, and then gave a bond for the whole amount. It is said, however, that it could not have been in the contemplation of the parties in this case that the money was to be advanced upon bottomree, since the master would not in that case have endeavoured, as he states himself, that he did, to have borrowed money from other persons for the repayment of the sum he had received from *Lanagoiti*. But the money was certainly advanced on the faith, that some good security would be given. The party who lent the money had a right by the maritime law to detain this ship and cargo till the debt was repaid, and it is only by the means of this bond that the owners have had the benefit of the liberation of their property. It is said that the owners have not acquired the same profit they would have done, if the bond had not been entered into; but that is a circumstance which can have no

weight with the Court in the deciſion of this queſtion. Wherever there is a neceſſity for borrowing money upon bottomree, the tranſaction muſt neceſſarily turn out leſs profitable than it would have done if no ſuch neceſſity had exiſted. If the maſter had not in this caſe exerciſed his power of hypothecation, the loſs would have been ſtill greater, for the whole voyage would have been broken up. With reſpect to the high rate of intereſt (45 per cent.) at which the money was lent, that will not neceſſarily affect the validity of the bond, though it may certainly be very proper matter for reference to the regiſtrar and merchants. It may be that the rate of intereſt which was charged upon this loan was not unreaſonably high at the time when the caſualties of war as well as the dangers of the ſea were to be provided againſt. Upon the whole, I am of opinion that the validity of the bond is ſufficiently eſtabliſhed.

May 5th, 1812.

ALEXANDER, TATE.

Consignees of a cargo advancing money for the neceſſary repairs of a ſhip are juſtified in taking a bond of hypothecation from a perſon whom as a meaſure of neceſſity they had themſelves ſubſtituted for the former maſter.

THIS was a queſtion reſpecting the validity of a bottomree-bond, which was granted at *Pernambuco*, on this ſhip, her tackle, apparel, furniture, and freight, &c.

JUDGMENT.

Sir *W. Scott*.—The validity of this bottomree-bond, which was granted by the maſter of the ſhip at *Pernambuco*, is oppoſed by the aſſignees of Mr. *Thomas*, the owner: and it has been juſtly obſerved, that aſſignees are not bound to act with the ſame degree of liberality as the owner himſelf. As truſtees for the creditors, they are not at liberty to ſubmit to demands which may appear at all queſtionable, but muſt take the beſt means in their power to render the eſtate of the bankrupt as beneficial as poſſible to the perſons with the care of whoſe intereſts they are intruſted.

The firſt queſtion in this caſe ariſes upon the competency of the perſon who appeared as maſter, to grant a bond of this deſcription.

The next queſtion is, whether the proceſs which has been taken out by the bondholder will affect the ſails and rigging, which appear to have been removed from the ſhip before theſe proceedings commenced.

It is unneceſſary for me to ſtate, that bonds of hypothecation are of a very high and privileged nature. They were invented for the purpoſe of procuring the neceſſary ſupplies for ſhips which may happen to be in diſtreſs in foreign ports, where the maſter and the owners are without credit, and where, unleſs aſſiſtance

ance could be ſecured by means of ſuch an inſtrument, the veſſels and their cargoes muſt be left to periſh. It is important, therefore, to the intereſts of commerce, that bonds of this kind ſhould be upheld with a very ſtrong hand; and, accordingly, they have at all times been ſo upheld by this Court when they appear to have been entered into *bonâ fide*, and without any ſuſpicion of fraud.

It has been made matter of obſervation, that the charges are, in this caſe, very high; but that is a circumſtance which affords no neceſſary inference of fraud. If the amount of the charges becomes matter of diſpute, it muſt be adjuſted in the uſual manner by a reference to the regiſtrar and merchants. I ſhall, therefore, lay any objection of this kind entirely out of my conſideration.

The neceſſity of borrowing money by hypothecation appears to me to be as fully made out in this, as in any caſe that ever preſented itſelf to the notice of the Court. The hiſtory of the tranſaction is indeed ſomewhat obſcure; but it appears that the ſhip had ſailed with a cargo of cotton, chartered for *Pernambuco*; and that, either from accidents or from ſome miſconduct of the maſter, who was ſent out in charge of the ſhip, ſhe got into a place 300 miles diſtant from her port of deſtination. The maſter, upon this, communicated his ſituation to the conſignees of the cargo at *Pernambuco*, who interfered in a manner very beneficial to all parties, and put the veſſel into a condition to come on to that place. At *Pernambuco*, they again applied themſelves to the buſineſs of the veſſel, by cauſing her to be further repaired, at a very conſiderable expence, and put in a fit ſtate to perform the return-voyage to *Liverpool*, where ſhe arrived in ſafety, under the command of a

The ALEXANDER.

May 5th, 1812.

person whom they had, as a measure of necessity, substituted for the master, who had deserted. For the money thus expended by them in the outfit of the vessel, the consignees, as I think they were fully justified in doing, took a bond of hypothecation. Now it is not upon minute criticism on the language of the bond, that the Court will be induced to reject a claim so founded. It will look to the substantial justice of the case; and if it finds that the consignees acted for the best in every respect, and that the money was advanced by them on the credit of the ship, when it could not be procured in any other mode, it will not much regard any defect in the formality of the instrument. Upon what grounds and by what authority was the money advanced? By the situation of the ship, and the desertion of the master, she had of necessity devolved entirely into the hands of these gentlemen, who made the necessary advances for the repairs. It is said they were induced to do this by their connexion with the proprietors of the cargo. But the question is, whether, so induced, they did not make these advances on the credit of the ship. Against the proprietors of the cargo, they had no direct demand for repairs done to the ship; and, as they had no knowledge of the owners of the ship, it must have been that they looked to the ship itself as their security. Some of the advances were made before the master was appointed; and these it is said, could have had no reference to a bond of hypothecation. But what could they look to but the ship? for of the owners of the ship they had no knowledge. The bond was not, perhaps, noticed at first; because, in *Pernambuco*, as in other foreign states, there is no necessity for an instrument of this kind; for, by the general maritime law, the vessel itself is *ipso facto* liable

The ALEXANDER.

May 5th, 1812.

liable for repairs. There was no neceſſity, therefore, for having recourſe to a bond till the ſhip was coming to this country, where, from peculiar motives of policy, a ſpecial hypothecation is required. Where the perſons advancing the money take a bond from the maſter, whom they had themſelves appointed, the Court will certainly watch the tranſaction very narrowly, and will be on its guard againſt any danger of poſſible colluſion; but I ſee no ground for ſuſpicion in the preſent caſe, for the ſhip could not have ſailed without a maſter. Under the care of the individual appointed by them to act in that capacity, ſhe *has* been enabled to perform her voyage, and *has* earned her freight, by bringing her cargo to the port of deſtination.

Then what is the deficiency in the appointment of the maſter? He is appointed under a neceſſity which juſtified the meaſure, and by the very perſons whoſe connexion with the cargo placed them in a nearer relation to the ſhip than any others in that quarter of the world. Under ſuch circumſtances, the Court would feel ſtrongly inclined to hold this man entitled to the privileges, and competent to diſcharge the functions of a maſter appointed in the moſt regular manner. What would be the effect of ſuch an appointment, if not ratified by any confirmation on the part of the owner, might be a queſtion of ſome nicety: But even then the Court would ſtrain hard to ſupport the appointment, provided the tranſaction ſhould appear to have been conducted with perfect integrity. But, in this caſe, the matter is not left on that ground; for here is, I think, a ſufficient recognition of the appointment. In the letter which was ſent from the conſignees of the cargo at *Pernambuco* to their correſpondents in this country,

The ALEXANDER.

May 5th, 1812.

country, they desire that the steps which they had taken should be communicated to the owner, and that he would signify his disapprobation, if he did not wish that the person whom they had appointed should continue to act as master of the ship. No disapprobation was signified; and the owner, in his affidavit, says, that he did not find it necessary to interfere in the business. I think this non-interference, after such a communication had been made to the owner, is of itself a sufficient ratification of the appointment. When the ship arrives in this country, what does the owner do? Why, he gives an order for payment of the freight earned by this ship, *describing this man as the master*; thus directly recognising him in that character. Being of opinion, then, that this man was competent to hypothecate the ship, and that the consignees of the cargo, when they advanced this money, looked to the security of the ship, and not to any personal security, I shall pronounce for the validity of this bottomree-bond. It will be for the owners of the ship to pursue their remedy against the owners of the cargo for contribution.

The warrant of the Court will extend to sails and rigging taken on shore for the purpose of safe custody, as well as to the ship itself.

The only question that remains is, that which relates to the sails and rigging; and these, it is said, are detached from the ship, and not within the jurisdiction of the Court. But how are they detached? Why, merely for the purpose of safe custody, and with the view of being returned to the ship when she goes out upon any new adventure, in conformity to what is stated to be the usual custom at the port of *Liverpool*. I cannot think that they are so detached in a legal sense as to prevent the warrant from extending to them as well as to the ship itself. I shall, therefore, over-rule the protest.

AUGUSTA, De Bluhn.

June 15th, 1813.

A bond of hypothecation is valid when no other ſecurity is held out than the ſhip and freight; *ſecus*, Where the lender looks only to the perſonal ſecurity of the borrower. It is not neceſſary that a bond ſhould be either good or bad *in toto*.

THIS was a queſtion reſpecting the validity of a bottomree bond granted on this ſhip and her freight, under the following circumſtances: In *September* 1810, the ſhip, belonging to Mr. *Richmond*, a *Britiſh* ſubject, was chartered by Mr. *Beerbohn*, of *London*, to proceed to the port of *Memel*, for the purpoſe of bringing back a cargo of timber to this country: In purſuance of the charter-party, the ſhip ſailed in the autumn of the ſame year to *Memel*, where ſhe took in a cargo from the houſe of Meſſrs. *Beerbohn*, of that place, but was detained in port by the froſt, and obliged to remain there during the whole of the winter. The maſter was furniſhed with a letter of credit from Mr. *Richmond*, the owner, to Meſſrs. *Beerbohn*, of *Memel*, and alſo with another letter of the ſame deſcription from Mr. *Robinſon*, of *London*, to Meſſrs. *Ruppil* and Co., of *Memel*, in which Mr. *Robinſon* recommended Mr. *Richmond* to the attention of his correſpondents, in caſe the neceſſary diſburſements ſhould be refuſed by Meſſrs. *Beerbohn*. Being in want of money for the repairs of his ſhip and other neceſſaries, the maſter applied to Meſſrs. *Beerbohn*, and was immediately ſupplied by them with the ſum of £445. 4*s*. 0*d*. Meſſrs. *Beerbohn* then requeſted the maſter to draw a bill of exchange, in their favor, for £600. and, as he well knew that he ſhould be obliged to call upon them for further ſupplies, he did not heſitate to comply with their requeſt, and accordingly drew a bill of exchange, to the amount propoſed, upon Mr. *Richmond*. The maſter afterwards obtained

The AUGUSTA. June 15th, 1813.

obtained further ſums of money from Meſſrs. *Beerbohn*, who, in conſequence of advices received from *England*, that the bill of exchange, drawn by the maſter, had not been honoured, refuſed to ſuffer the ſhip to ſail till they had obtained from him a bottomree-bond, for the whole of the money advanced to him ſince his arrival at *Memel*. The bond was accordingly ſigned by the maſter for £1666 13*s*. 5*d*. the amount of the ſums he had borrowed, together with 50 *per Cent*. premium thereupon, and the ſhip then ſailed for *London*, where ſhe arrived in ſafety, and delivered her cargo. Mr. *Richmond*, the owner of the ſhip, having ſince become a bankrupt, the validity of the bond was conteſted by his aſſignees.

For the aſſignees, *Jenner* and *Luſhington*.—The inſtrument is invalid as a bottomree-bond, becauſe the money was advanced not upon the ſpecific ſecurity of the ſhip, but upon the perſonal credit of Mr. *Richmond*, the owner. Although it may not be neceſſary that bottomree-bonds ſhould be executed at the exact time when the money is advanced, yet it is requiſite that it ſhould have been in the contemplation of both the parties that the money was to be ſecured by a bond of that deſcription. In the preſent caſe, there was no ſuch underſtanding between the parties; but, on the contrary, every thing to ſhew that they looked to ſecurities of a different kind. A letter of credit was written and delivered, the money lent upon the faith of that letter, and a bill of exchange drawn to cover part of the amount; which bill of exchange, it appears, would actually have been paid, if the owner had received the neceſſary advices from the maſter. The tranſaction therefore, being, in the firſt inſtance, wholly of a perſonal nature, Meſſrs. *Beerbohn* can

derive

The AUGUSTA. June 15th, 1813.

derive no advantage from this pretended bottomree-bond, but muſt be content to come in with the other creditors of the bankrupt.

For the bond-holders, *Stoddart* and *Phillimore*.—This tranſaction is clearly of the nature of bottomree, ſince the money was advanced to the maſter for the repairs of his ſhip, whilſt ſhe was lying in diſtreſs in a foreign port. It is quite unneceſſary that ſeparate bonds ſhould be given from time to time, as the ſeveral advances were made. If one bond be given to cover the amount of all the advances when the repairs are completed, that is ſufficient to ſatisfy the demands of the Court, which will conſider the different ſums as re-advanced at the time of the execution of the bond. It is a mere pretence to ſay that the maſter was not in diſtreſs for money on account of the letter of credit with which he was furniſhed, when the whole proceedings under that letter turned out a mere nullity. The bill of exchange, drawn by the maſter, not having been honoured, the foreign merchant was juſtified in looking to other ſecurity for the re-payment of his money, exactly in the ſame way as if no letter of credit had been written, and no bill of exchange drawn. He had a right, by the general maritime law of *Europe*, and by the particular law of the country where the ſhip was lying, to ſeize upon the ſhip itſelf; and he ought not to be put in a worſe ſituation becauſe he ſuffered her to proceed on the voyage, and contented himſelf with the ſecurity of a bond. *Iſabelle*, (ſupra 273.) *Alexander*, *Tate*, (ſupra 278.); *Rhadamanthe*, *Mayer*, (ſupra 201.)

JUDGMENT.

Sir *W. Scott*.—This is a queſtion ariſing upon a bottomree-bond, which was executed at *Memel*, on the 7th

The Augusta. June 15th, 1813.

7th of *June*, 1811. The Ship, it appears, was chartered by Mr. *Beerbohn*, of this town, who is not however described as the general agent of the house of the same name at *Memel*, to go thither, and bring a cargo back to this country; but upon whose account does not, I think, exactly appear. The master went with a letter of credit from him to the house of *Beerbohn* and Co. at *Memel*, (connected perhaps with the house of *Beerbohn*, at *London*, although no special privity appears between them,) desiring that the house would furnish him with any sum of money which he might stand in need of for disbursements. The master was furnished likewise with a letter from Mr. *Robinson*, recommending him to the attention of Messrs. *Ruppil* and Co. at *Memel*. These are precautions highly proper, and indeed almost necessary in the *Baltic* trade, which has of late years been subject to great interruptions. On his arrival at *Memel*, the master produced his letter to the house of *Beerbohn*, and, on the production of the letter, the money was advanced; and it is, I think, impossible to deny that it was advanced on the credit of that letter, and on the personal security of the gentleman by whom it was written. Not only was the money advanced without recourse to the security of the bond at the time, but another species of security was resorted to;—a bill of exchange was drawn upon a house in *London*, and this is, I think, very strong evidence to shew that it was a mere personal transaction, and that the foreign merchant relied on the personal responsibility of his correspondent. Now, certainly, hypothecation bonds are founded on a security of a very different kind, upon the ship and freight; and, according to the law of this country, they are resorted to only where there is a failure of personal security, in order to enable the master to supply himself,

The AUGUSTA. June 15th, 1812.

ſelf, in a foreign port, with neceſſaries which he would otherwiſe be unable to procure. From that neceſſity they ſpring, and upon the ground of that neceſſity alone are they ſupported by the Court. The maſter, by the maritime law of this country, agreeing, in this reſpect with the general law of *Europe*, is allowed under ſuch circumſtances, to hypothecate his ſhip, and to make it a real ſecurity for the money that may be wanted. If the parties, lending the money, think proper to rely on the perſonal ſecurity of thoſe to whom their money is advanced, and their confidence turns out to have been unfortunately miſplaced, they muſt abide the conſequences of their own indiſcretion. It is quite clear, in this caſe, that the bill of exchange was founded on conſiderations of perſonal reſponſibility only, and that a bond of hypothecation was not at that time in the contemplation either of the borrower or lender. I have therefore no heſitation in ſaying that with reſpect to the £600. the bond is not effective; but with reſpect to the other part of the money, I am of a different opinion. For that no other ſecurity was held out than the ſhip and the freight, and it is therefore, ſo far, indiſputably, a bottomree tranſaction. The foreign merchant, it is true, wiſhed to extend the ſame ſpecies of ſecurity to the whole of his debt, and I ſee nothing diſhoneſt or diſhonorable in his attempt to do ſo; but, at the ſame time, this Court cannot lend him its aſſiſtance by enforcing the bond beyond the extent of its legal validity. It cannot permit this gentleman to ſay, the maſter had no other reſource for procuring ſupplies except bottomree, when he himſelf had been content to advance the money on the perſonal reſponſibility of the owner. As far then as it relates to this £600., I think

The Augusta.

June 15th, 1813.

think the bond is invalid; but for the reſt, I think it ought to be enforced. It is not neceſſary here that a bond ſhould be either good or bad *in toto*: In the equitable proceedings in this Court, it may be good in part and bad in part.

It has been ſaid that the party might, by the law of Ruſſia, have detained this ſhip till the money was repaid; but I do not think that circumſtance alone will be ſufficient to convert this into a caſe of hypothecation. Ships might, in all caſes, be detained on the ſame ground by the general law of *Europe*, and if the poſition, which has been laid down, were to be ſupported, it would go the length of turning every caſe into a caſe of hypothecation, or at leaſt there would be a neceſſity of enquiring, in every caſe, into the ſtate of the foreign law. The fair legal equity in this caſe will be to diſtinguiſh between the ſum for which the bill of exchange was drawn, and that which ſtood upon the ſecurity of the ſhip and freight only; and I accordingly pronounce againſt the validity of the bond, as far as it reſpects the £600., but pronounce it to be good as to the money afterwards advanced to the maſter.

BETSEY, Hay.

June 22d, 1813.

Where there are two bottomree-bonds, the holders of the one laſt dated bond are entitled to priority of payment though the difference to date is very ſlight, andthough the bonds ſhould be in other reſpects ſimilar.

THIS was a queſtion between the holders of two bottomree bonds, each of them ſeeking, under the following circumſtances, to obtain a *primum decretum* from the Court. The ſhip, belonging to *Britiſh* merchants, was lying in the port of *Carlſcrona*, with a cargo on board, with which ſhe was deſtined to *Hull*; when the maſter, in order to procure neceſſaries to enable the ſhip to proceed on her deſtined voyage, borrowed in *Stockholm*, from Meſſrs. *Tottie* and *Arfviedſen*, of that place, the ſum of £252. at a premium of 25 per cent., the repayment of which he ſecured to them by a bottomree-bond, dated at *Carlſcrona*, *March* 12th, 1813. Further repairs being required, he was again under the neceſſity of hypothecating his ſhip, cargo, and freight, by borrowing from Meſſrs. *Lindegreen* and Co. the ſum of £178. 14s., at the ſame rate of 25 per cent., and giving them a bottomree bond, dated at *Carlſcrona*, *March* 17th, 1813.

The counſel for Meſſrs. *Lindegreen* and Co. contended, that they were intitled to excluſive poſſeſſion of the ſhip, and to priority of payment, becauſe the inſtrument of hypothecation, granted to them, was of later date than that granted to Meſſrs. *Tottie* and *Arfviedſen*.

On the other ſide, it was argued that the Court would not give a preference to the later bond, where there was ſo very ſlight a difference as to date, and where the bonds were executed at the ſame place, the

The BETSEY.

money lent at the ſame rate of intereſt, upon the ſame voyage, and at the ſame riſk.

June 22d, 1813.

Court granted *primum decretum* to the holder of the laſt dated bond.

June 28th, 1813.

NOSTRA SIGNORA DE LOS DOLORES.—MORALES.

In a court of the law of nations a perſon may be conſidered a part owner of a privateer, though his name has never been inſerted in the bill of ſale or ſhip's regiſter; and the repreſentative of a perſon ſo deemed a part-owner is reſponſible for coſts and damages decreed againſt the owners generally, though the party of whom he is the repreſentative was not himſelf the wrong-doer.

THIS was the caſe of a *Spaniſh* ſhip and cargo, which were captured on the 9th of *Auguſt* 1803, by the private ſloop of war the *Dragon*, and decreed to be reſtored, with coſts and damages, on the 19th of *December*, in the ſame year. Hoſtilities having ſhortly afterwards taken place between *Great Britain* and *Spain*, all further proceedings in the cauſe were ſuſpended. On the reſtoration of peace between the two countries, an account of the coſts and damages was brought in on behalf of the *Spaniſh* claimants, and the ſame was referred to the regiſtrar and merchants, who reported the amount thereof to be £5,148. 14s. 6*d.*, which report was afterwards confirmed by the judge. Monitions were decreed againſt the owners of the privateer and the bail (who had given ſecurity to the amount of £1,500) to pay the amount of the regiſtrar's report: and amongſt the reſt againſt *Hannah Greaves*, (wife of *Robert Greaves*) the widow and one of the executors of *John Parry*, who was alledged to have been a part-owner of the privateer. An appearance was given for Mrs. *Greaves* under proteſt, and the queſtion was, whether ſhe, as the repreſentative of

The NOSTRA SIGNORA DE LOS DOLORES.

June 28th, 1813.

of Mr. *Parry*, was by law reſponſible for the coſts and damages reported to be due on account of the capture of this ſhip.

For the party cited, *Stoddart* and *Luſhington*.—Mrs. *Greaves*, the widow and executrix of Mr. *John Parry*, and now married again, is called upon without any previous intimation by a monition, dated *July* 1812, for payment of coſts and damages due on account of the capture of this veſſel, in *Auguſt* 1803. After ſo great a lapſe of time, the Court will not be inclined to enforce a demand of this kind, eſpecially againſt the repreſentative of a deceaſed perſon, who was himſelf not guilty of any perſonal miſconduct. As the name of Mr. *Parry* does not appear to have been inſerted in the bill of ſale or in the ſhip's regiſter, we ſubmit that he is not to be conſidered as an owner under the proviſions of the ſtatutes, 26 *Geo.* 3. *c.* 60. and 34 *Geo.* 3. *c.* 68. which render ſuch an inſertion neceſſary. Upon this point many caſes have been decided. *Rolleſton* v. *Hibbert*, (3 *T. R.* 406.) *Camden* and others, v. *Anderſon*, (5 *T. R.* 709.) *Weſterdale* v. *Dale*, (7 *T. R.* 306.) *Hibbert* v. *Rolleſton*, (3 *Bro. Cha. Cas.* 571.) *Curtis* v. *Perry*, (6 *Veſey*, Junior, 739.) *ex parte Yallop*, (15 *Veſey*, Junior, 60.) *ex parte Houghton*, (17 *Veſey*, Junior, 251.) *Moſs* v. *Charnock*, (2 *Eaſt*, 399.) *Batt*, *Voſs*, before the Lords of Appeal in *January* 1806. The reſult of theſe caſes is, that perſons whoſe names are not inſerted in the bill of ſale and regiſter, can have no title, either legal or equitable, to a *Britiſh* ſhip. Mr. *Parry*, then, under the authority of theſe caſes, is not to be deemed the legal owner of this veſſel. He is not by law entitled to any of the advantages which might have been derived to an owner by the ſucceſsful employment of the ſhip, and conſequently

The NOSTRA SIGNORA DE LOS DOLORES.

June 28th, 1813.

ſequently ought not to be reſponſible for any loſs that may have been occaſioned by the miſconduct of thoſe to whoſe management ſhe was intruſted. But admitting, for the ſake of argument, that Mr. *Parry* was originally liable to be called upon for the payment of theſe coſts and damages, the right of the claimants to enforce the demand againſt him ceaſed upon their becoming alien enemies. If the *Spaniſh* claimants have been damnified at all, they have been damnified by the declaration of war iſſued by the *Spaniſh* government, which muſt be taken as their own act, every perſon being conſidered in law a party to the public authoritative acts of his own government. *Conway* v. *Gray*, (10 *Eaſt*, 536.)

It was alſo urged on behalf of Mrs. *Greaves*, that when letters of marque were granted, Government had provided ſpecific ſecurities againſt any miſconduct in thoſe who received them; that ſuch ſecurities muſt have been conſidered amply ſufficient to prevent, or at leaſt make compenſation for any abuſe which might be committed. What theſe ſecurities ſhould be, the prize act had pointed out. It required a recognizance from the owner or owners in a certain ſum, and bail as a further protection. Government looked only to the owners and to the bail, It went no farther; to thoſe who appeared and complied with the conditions preſcribed, the letters of marque were granted; to them alone any legal benefit could enure, and in them all legal reſponſibility reſted.

In the preſent inſtance Mr. *Parry* had never been known in the tranſaction at all, he had not appeared as owner either when the letters of marque were granted, or in any other manner claimed of Government the benefit of them, nor rendered himſelf reſponſible.

The NOSTRA SIGNORA DE LOS DOLORES.

June 28th, 1813.

ſible. Any private agreement with thoſe who came forward and acted oſtenſibly as the owners cannot alter the caſe; ſuch agreement could give him no legal title under the letters of marque, and therefore in equity ſhould not ſubject him to any penal conſequences ariſing from the miſapplication of them; Government conſidered that ample ſecurity had been provided: Mr. *Parry*, his rights, intereſt, and obligations, were never in contemplation; it would therefore be highly unjuſt now to turn round upon his executors ten years after his death and require his eſtate to make good the deficiency of thoſe very ſecurities, on the faith of which and of which alone the letters of marque were granted.

For the Claimants, the Advocate of the Admiralty.—This is the caſe of a ſhip and cargo belonging to a friendly nation, which were taken and plundered in a time of peace, and for which it concerns the honour and character of the country, that compenſation ſhould be made to the foreign claimants. A ſentence of reſtitution, with coſts and damages, was originally pronounced; but the execution of that ſentence was not enforced, on account of the hoſtilities which took place between *Great Britain* and *Spain*. On the return of peace between the two countries, the proceedings were revived, and monitions were taken out againſt all the different parties, againſt the perſon whoſe name appeared as owner in the documents, and who has ſince become inſolvent, and alſo againſt the ſureties, though not enforced againſt them, as they were reſponſible to a certain amount only. The claimants, therefore, have acted with every degree of diligence, and ought not to be barred of their

The NOSTRA SIGNORA DE LOS DOLORES.

June 28th, 1813.

remedy on account of lapſe of time only. The party now proceeded againſt is admitted to be the repreſentative of Mr. *Parry*; but it is ſaid, that Mr. *Parry* was not a legal owner of this ſhip according to the ſtatutes of the kingdom. The ſtatutes, however, which have been referred to, were paſſed for a particular purpoſe only, and with a view to ſecure the navigation of this country as far as poſſible to its own ſubjects. Though binding upon the ſubjects of this country in all queſtions of property that may ariſe between them, they were never intended to apply to foreigners ſuing in a court of the law of nations for rights founded upon that law. The caſes therefore, which have been cited from the municipal courts, are inapplicable to the preſent caſe, which involves the intereſt of perſons who are not bound by the particular acts of a *Britiſh* parliament made in reſpect to *Britiſh* ſubjects. The Court has to enquire, not whether the party proceeded againſt was ſtrictly and technically an owner, as far as the intereſts of other *Britiſh* ſubjects may be concerned; but, generally, whether he was in truth ſo far connected with and concerned in the tranſaction as to make himſelf equitably reſponſible for the acts of this privateer. It appears that Mr. *Parry* contributed to the outfit and purchaſe of this veſſel, and that he correſponded on the ſubject of the appointment of the maſter. He was therefore a principal agent in the tranſaction, and as ſuch is reſponſible, according to the law of nations, for the injury that has been committed. The caſe of the *Batt, Voſs*, was of a very different kind. There it was proved, that the perſon againſt whom the monition iſſued had no ſhare in the purchaſe or outfit of the veſſel, and that a mere verbal tranſfer had been made

to

The NOSTRA SIGNORA DE LOS DOLORES.

June 28th, 1813.

to him in part-satisfaction of a debt due from one of the actual owners, and that he had disposed of any imperfect interest he might have had in the ship before the capture in question occurred. The non-appearance of his name in the register was only one amongst many other reasons for his dismissal. With respect to the war which has taken place, that cannot affect the rights of the parties. Whatever might have been the effect of hostilities whilst they subsisted, is now become immaterial, since the rights of the claimants revived on the return of peace. The omission of the crown to interfere during the war, has left the interests of the parties precisely in their original state.

JUDGMENT.

Sir *W. Scott*.—This is a proceeding to recover from Mrs. *Greaves*, the executrix of a Mr. *Parry*, the amount of costs and damages which have been decreed against the owners of a privateer for the capture of a *Spanish* vessel in time of peace. As far as I recollect the case, it was one of very great misconduct on the part of the captors, who had been guilty of a gross violation of the law of nations. The question is, whether Mrs. *Greaves*, as the representative of a person alledged to have been one of the owners of this privateer, shall be held responsible for the payment of the costs and damages which have been awarded. It may, in particular cases, be very hard upon the representatives of deceased persons, that they should be called upon to answer for the actions of those who are gone, and to make compensation for misdeeds of which, perhaps, they never before heard the existence. Such, however,

The NOSTRA SIGNORA DE LOS DOLORES.

June 28th, 1813.

is the law, that parties who are repreſentatives muſt frequently be reſponſible, at leaſt to the extent of the property derived from thoſe whom they repreſent. It may be obſerved, likewiſe, that here, as in other caſes, the principal was not perſonally concerned in the act complained of; that he was not himſelf the wrong-doer; but he cannot upon that account only be diſcharged from reſponſibility. It frequently happens that perſons muſt ſuffer for the miſconduct of thoſe whom they employ, and, in caſes of this kind, it is peculiarly proper that it ſhould be ſo; ſuch a burthen appears neceſſarily to ariſe from the tenure by which this kind of property is held. It is neceſſary, for the honour and juſtice of the country, that compenſation ſhould be made for the wrong which has been done, though at the expence of parties who may have been perſonally innocent.

The queſtion is, whether Mr. *Parry* is to be conſidered *quoad hoc* an owner of this privateer, for he may perhaps be ſo conſidered for this particular tranſaction, though not for all other purpoſes. Now it appears that Mr. *Parry* was actively and directly concerned in the purchaſe and outfit of this veſſel, and that the appointment of the maſter took place under his own directions. Here is a ſeries of letters, too, which ſhew that he continued afterwards to beſtow his time and attention in the management of this property, as property in which he was intereſted. Nothing, therefore, can be more clear than that he is to be conſidered as a proprietor, and that he would, in all juſtice, be entitled to the benefit which might be acquired in that character, and conſequently that he muſt be reſponſible for all the loſs that may be ſuſtained.

It

The NOSTRA SIGNORA DE LOS DOLORES.

June 28th, 1813.

It appears that the name of another perſon only, a Mr. *Evans*, was inſerted in the bill of ſale, and that the ship's regiſter and the letters of marque are ſimilar in that reſpect to the bill of ſale. Now it has been laid down by the counſel, that the perſon named in the bill of ſale is the only perſon who can by law be named in the regiſter, and is the only perſon who can be recognized as owner, as far as municipal intereſts are concerned. I cannot agree in the truth of this poſition to the extent in which it has been ſtated, namely, that where three or four perſons concur in the purchaſe of a veſſel, one of them, by cauſing his own name only to be inſerted in the bill of ſale, may take to himſelf the whole property, and the others be left without a remedy. There muſt be ſome mode or other of procuring the inſertion of the other names, though it is not for me to point out what that mode may be. Mr. *Parry*, having contributed his money in the purchaſe and outfit of this veſſel, had a legal right to have his name inſerted in the regiſter; and if he neglected to do ſo, and ſuffered his intereſts to be compromiſed, it was entirely his own fault. Even if he ſhould not be entitled to the benefits which may be acquired as an owner of this privateer, it does not follow that he is to be exempted from the loſſes which may be ſuſtained in that capacity. He can have no right to plead his own laches, in order to relieve himſelf from the claims of others as adverſe to him. In point of ſubſtance, though not in point of form, he is an owner of this privateer. It is certainly true that the Act of Parliament, commonly called Lord *Liverpool's* act, (26 *G.* 3. *c.* 60,) makes it neceſſary that the name of the owner ſhould appear in the regiſter; and it has been decided in a variety of caſes, and is to be taken as clear and eſtabliſhed

The NOSTRA SIGNORA DE LOS DOLORES.

June 28th, 1813.

eſtabliſhed law, that third parties, if *Britiſh* ſubjects, have no claim on any but the perſon regiſtered as owner. But I am yet to learn that this rule of law is applicable to foreigners, who are not bound by the municipal regulations of this country. This is a queſtion of the law of nations; and the party complainant, being a foreigner, comes to a court which has to adminiſter that law. The ſtatute was paſſed for reaſons of domeſtic policy, and all its regulations are of a domeſtic deſcription. Being a *Britiſh* ſtatute, it may well bind all the ſubjects of this Country, becauſe it emanates from an authority which all *Britiſh* ſubjects are bound to obey; but, as againſt the ſubjects of other countries, it has no ſuch force; nor has any authority been cited, either from the deciſions of the courts of common law or of chancery, to ſhew that it has been ſo conſidered. I do not recognize the applicability of thoſe caſes which have been determined between *Britiſh* ſubjects to ſuch a caſe as this, which is founded on the law of nations, is brought on the complaint of a perſon not ſubject to our laws, and is to be tried in a court whoſe duty it is to adminiſter the law of nations. Unleſs, therefore, ſome caſe could be produced which it ſhould appear that foreigners have been held to be within the proviſion of this ſtatute, I am inclined to think that Mr. *Parry* is not exonerated from his reſponſibility. Now the only caſe of the kind which has been mentioned is, that of the *Batt, Voſs*, which was before the Lords of Appeal in the year 1806. It was a caſe in which there were ſeveral original owners of a privateer, one of whom, being indebted to a perſon of the name of *Richardſon*, transferred to him his ſhare of the privateer, as far as he could do ſo *by mere verbal agreement*. This perſon, who had nothing to do with

The NOSTRA SIGNORA DE LOS DOLORES.

June 28th, 1813.

the original purchaſe and outfit of the veſſel, and who knew nothing of the tranſaction in queſtion till long after it had taken place, was ſerved with a monition, but was held by the ſuperior court not to be reſponſible. But that caſe was very different from the preſent. There the party had nothing to do with the purchaſe or management of the veſſel. Here Mr. *Parry* is the perſon with whom the tranſaction originates, and who is very active in ſuperintending the conduct and management of it throughout. I do not think that the authority which relieved Mr. *Richardſon*, in that caſe, would extend the ſame indulgence to Mr. *Parry*. I think therefore, that the caſe which has been cited ought not to control what I have before ſtated to be the general rule.

Then with reſpect to the laches which has been imputed, I confeſs I do not ſee that any has taken place. The party being a foreigner, the proceedings inſtituted by him were neceſſarily ſuſpended upon the breaking out of hoſtilities between *Great Britain*, and the country of which he is a ſubject; but, when the war ceaſed, he had a right to revive the proceedings, and to recur to his former remedy. As far as my judgment goes, therefore, I am of opinion that I cannot diſmiſs the parties, but muſt over-rule the proteſt.

I forgot to mention that it is the duty of the owners to take care that their names are inſerted in the bill of ſale, and that it is very important to the ſecurity of foreigners that none of the owners ſhould be omitted; otherwiſe, by the inſertion of one name only, and that perhaps the name of an inſolvent perſon, all the reſt might eſcape from reſponſibility.

July 8th, 1813.

ÆOLUS, MYNNE.

Persons using due diligence are entitled to the benefit of a Licence notwithstanding its expiration and the refusal of Government to renew it.

THIS ſhip, together with her cargo, conſiſting of 19,447 gallons of brandy, was ſeized by a Cuſtom-Houſe officer in the *London* Docks, in the month of *April* laſt.

There were four *Britiſh* licences on board at the time of ſeizure; the firſt of which was dated the 9th of *July* 1812, and was to remain in force for the ſpace of four months. By the terms of this licence, the claimants were permitted to export in this veſſel, from *London* to *Rochelle* or *Havre*, a cargo of *Britiſh* goods and to import from *Rochelle*, or to ſail in ballaſt from that place to *Havre*, and import from thence a cargo of wine, ſpirits, &c. on condition that the wine and ſpirits ſhould be imported only in return for ſugar, coffee, &c. previouſly exported; the proportion of ſpirits to be not more than 120 gallons for every 12 cwt. of ſugar; and on condition, likewiſe, that the ſpirits ſhould be imported and warehouſed for exportation only.

On the 31ſt of *July*, a licence ſimilar to the former was granted with an additional clauſe, permitting the ſhip to proceed in ballaſt from *Rochelle* or *Havre* to *Bourdeaux*, and import the cargo from that port.

The quantity of ſugar exported not entitling the veſſel to bring back a complete cargo of ſpirits, according to the terms of the above-mentioned licences, an additional licence was applied for, and granted on the 27th of *Auguſt*, 1812. By this licence the claimants were at liberty to import *a full cargo of wine and ſpirits*, on condition that the exceſs of ſuch wine

and

The ÆOLUS.

July 8th, 1813.

and ſpirits, for which the export of ſugar had not already been made, ſhould be warehouſed according to the regulations ſet forth in the licences, dated the 9th and 31ſt of *July*.

This licence having likewiſe expired before the voyage was completed, a further application was made to the Government, and, on the 4th of *January* 1813, a licence to be in force for three months was iſſued, pemitting this veſſel to import a cargo, according to the proviſion of the licences, dated the 9th and 31ſt of *July* 1812.

There was alſo an order in council, dated the 15th of *April* 1813, directing the ſhip to be admitted to entry, according to the conditions of the licence, dated the 4th of *January* 1813; notwithſtanding the expiration of that licence.

The veſſel proceeded to *Rochelle*, and there delivered a cargo of ſugar, purſuant to the terms of the ſeveral licences; but, having been detained by order of the *French* government, was unable to bring back a return cargo within the time preſcribed. Upon her arrival in the *London* Docks, the ſhip and the whole of her cargo, conſiſting of 19,447 gallons of brandy, were ſeized; but as it appeared, from the ſtatement of the exports and imports, made by the proper officer, that the claimant had a right under the renewed licences to import 14,610 gallons of ſpirits, the ſeizor conſented to the reſtitution of that quantity of brandy, and of the ſhip itſelf. The remaining 4,867 gallons of brandy, being the exceſs of the quantity allowed by the renewed licences, were proceeded againſt as droits of admiralty.

For the ſeizor it was ſaid, that the refuſal of the *Britiſh* Government to grant an extenſion of the licence,

The Æolus.

July 8th, 1813.

licence, dated the 27th of *Auguſt*, which alone permitted the importation of a full cargo, ſufficiently declared Its intention not to protect beyond the quantity covered by the other licences; and that it was incumbent on the court to carry the intention of the Government into execution by condemning the ſurplus.

To which it was replied, that the Government refuſed to renew the licence of *Auguſt* 1812, merely in conſequence of a general change of policy with reſpect to the future commercial intercourſe with the ports of *France*. That it did not mean to interfere with what was paſt, but to refer all caſes of exiſting licences to the deciſion of the Court; and that, with reference to the principle of former deciſions, the claimant who had uſed every degree of diligence to complete the tranſaction within the time preſcribed, was entitled to reſtitution.

JUDGMENT.

Sir *W. Scott*.—Where the party has uſed his beſt endeavours to fulfil his engagement, and has been prevented by the violence of the enemy from finiſhing the tranſaction in due time, the Court will decree reſtitution, though the Government may have refuſed to renew the licence. The refuſal of the Government to grant a freſh licence appears to me to leave the principle, upon which the Court has been in the habit of acting, untouched; and, as the delay in this caſe has been occaſioned ſolely by the reſtraint impoſed by the hoſtile government, I ſhall reſtore the property to the claimant.

MARIA THERESA, PHILLIPS.

July 8th, 1813.

Alien enemies are at liberty to ſue in the courts of this country for wages earned by them as mariners on a voyage to this country under the protection of a licence.

THIS was a ſuit for wages brought by ſome mariners who ſailed on board this *American* veſſel, from the port of *New York*, under an engagement to proceed to *Gottenburgh* and back. The maſter, however, inſtead of going to *Gottenburgh*, according to the agreement entered into with his men, ſailed to *St. Peterſburgh*; and there took a new cargo on board, which he brought to the Port of *London*, under the protection of a *Britiſh* licence. Upon their arrival in this country, the ſeamen demanded their wages, and, upon the refuſal of the maſter to ſatisfy their demands, the ſhip was arreſted.

The caſe now came before the Court upon a motion to ſuperſede the warrant of arreſt.

In ſupport of the motion it was contended, that the voyage was not complete till the return of the ſhip to *New York*, and conſequently that the mariners were not entitled to their wages till their arrival in that port: that, being alien enemies, they could not ſue in the courts of this country.

On behalf of the mariners it was ſaid, that the voyage from *St. Peterſburgh* to the Port of *London* had nothing to do with the original agreement entered into at *New York*; and that, having come to this country under the protection of a *Britiſh* licence, the character of an alien enemy was *pro hâc vice* diſcharged, and the men at liberty to recover their wages by the aſſiſtance of a *Britiſh* court of juſtice.

JUDGMENT.

The MARIA THERESA.

July 8th, 1813.

JUDGMENT.

Sir *W. Scott*.—This ſhip ſailed from an *American* port with an underſtanding, on the part of the ſeamen, that they were to proceed to *Gottenburgh* and back; inſtead of that, the maſter diſcharged his cargo at *St. Peterſburgh*, and entered into a new contract to come to the port of *London*, under licence, which he could not do conſiſtently with the laws of his own country. I think this conduct of the maſter has the effect of diſſolving the original contract under which the parties ſailed from *New York*. If he is at liberty to enter into a new engagement, it would be very unfair to bind down the men to the terms of their original contract. It cannot be that the men ſhould be faſt and the maſter looſe at the ſame inſtant. Are the men bound to return to *New York* with this ſhip? I think, certainly not. Suppoſe they do go back, how are they to obtain their wages? They can get no redreſs from an *American* court of juſtice; for the whole tranſaction is illegal by the laws of that country. If this court ſhould refuſe them the benefit of its aſſiſtance, the men would be deprived of all remedy; I ſhall therefore pronounce for the juriſdiction of the Court, and ſhall compel the payment of their wages to the ſeamen.

Motion to ſuperſede the warrant of arreſt refuſed.

WOHLFORTH, STEENVELD.

July 13th, 1813.

Where the original cargo has been ſpoiled by unavoidable accident, the protection of a licence is not forfeited by taking in a freſh cargo of the ſame kind after the time for which the licence was granted had expired.

THIS was the caſe of a ſhip, under *Pruſſian* colours, laden with a cargo, conſiſting of 57,400 *Edam* cheeſes, one caſk of drugs, and one cheſt of coral beads. There was a licence on board, permitting the veſſel to import from *Amſterdam* to *London* a cargo of cheeſe, drugs, &c. (even if enemy's property), and to export from *London* to *Amſterdam* a cargo of permitted goods, no condition that the cargo ſo imported ſhould, on the arrival of the veſſel in the port of *London*, be landed and placed under the joint locks of the crown and of the importer, there to remain at the expence of the importers until they ſhould have loaded and exported in the ſame veſſel from the port of *London* to *Amſterdam* a cargo of goods as aforeſaid permitted to be exported, to the value of not leſs than £10 ſterling for every ton burthen, according to the admeaſurement of the veſſel. The licence, which was to be in force for three months, was dated on the 2d of *December* 1812, and conſequently expired on the 2d of *March* 1813. The capture was made on the 19th of *June*. It appeared from the evidence of the maſter, &c. that the ſhip ſailed from *Amſterdam* on the 24th of *February*, and that, having ſuſtained conſiderable damage, ſhe was compelled to put into *Medemblick* in *Holland*; that the cheeſe was totally ſpoiled, and that there was a neceſſity of unloading the cargo, both on account of its damaged ſtate, and alſo for the purpoſe of repairing the ſhip. After the repairs were completed, the ſhip was arreſted for the expences incurred, which occaſioned farther delay; but as ſoon as the ſhip was at liberty to proceed, ſhe

The WORLFORTH.

July 13th, 1813.

ſailed with a new cargo of cheeſes, of the ſame quantity and quality with thoſe originally ſhipped. The queſtion was, whether the veſſel had forfeited the protection of the licence by taking in a freſh cargo after the time for which it was granted had expired.

JUDGMENT.

Sir *W. Scott*—In what manner the inſurers might decide this queſtion, I cannot take upon myſelf to ſay. Looking naturally enough to their own intereſts, they might perhaps view it in a very different light from that in which this Court, deſirous of putting a liberal interpretation on the intentions of Government and the acts of individuals under thoſe intentions as expreſſed, is bound to view the tranſaction. It does not appear to me that what has been done in this caſe amounts to a violation of the licence.

It appears that the ſhip, having taken on board her cargo, conſiſting of 54,700 cheeſes, ſailed from *Amſterdam*, and that ſhe was obliged to put into *Medemblick*, which bears the ſame relative ſituation to *Amſterdam* that *Graveſend* does to *London*. At *Medemblick* it was neceſſary to unlade the cargo; and the cheeſe, upon unlivery, was found to be ſo much damaged, that it was not fit to be put on board again. It was, therefore, thought adviſable to ſell the old cargo, and purchaſe a new one, of the ſame deſcription, which was accordingly done. Now this circumſtance of purchaſing a cargo of preciſely the ſame deſcription, does, I think, diſtinguiſh the preſent caſe very materially from thoſe which have been alluded to, in which the original tranſactions were departed from, and new adventures undertaken. Here the ſecond cargo was of the ſame identical nature with the firſt, correſponding with it both in ſubſtance and quality. It does not appear that there

The WORLFORTH. July 13th 1813.

there was time to have obtained a freſh permiſſion from the *Britiſh* Government. If the ſhip had received damage after her arrival in the *Thames*, and had then gone back to the *Texel* for the purpoſe of taking a freſh cargo, the ſame indulgence could not have been reaſonably expected; becauſe there the parties might have had acceſs to Government, and might have applied, without loſs of time, for a new licence. The caſe is very different, where the ſhip is in a diſtant port, and where the foreign ſhippers are acting for perſons in this country without the ready means of communication with their principals. What more adviſeable method could the parties have adopted under the circumſtances ſtated? Was the licence to be rendered abortive? Was the ſhip to come in ballaſt? That would not have been permitted. If the cheeſes originally put on board had been brought hither, they muſt, under the terms of the licence, have been put into Government warehouſes, and there kept as a ſecuſity till a return cargo had been exported. But what would have been the value of the ſecurity if the cheeſes were of no value? I cannot think there has been ſuch a departure from the licence as to deprive the parties of all protection under it. The caſe would have been widely different, if goods of a different deſcription had been taken inſtead of the former cargo. Here the original purpoſe was purſued: No new ſpeculation was originated, nor any change, except ſuch as was produced by time and unavoidable accidents. I am of opinion, therefore, that I do not go beyond a juſt and fair interpretation of the licence, in ſaying that the tranſaction comes within the latitude that ought to be allowed.

Ship and cargo reſtored.

November 4th, 1813.

LOUISE CHARLOTTE DE GULDENERONI, HANSEN.

The fraudulent alteration of a licence destroys its validity, even where the person claiming protection under it is innocent of the fraud.

THIS was the case of a ship, under *Danish* colours, laden with a cargo of corn, and taken in the prosecution for a voyage from *Aarhuus* with an asserted destination to the port of *Newcastle*. A claim was given for the ship and cargo, as protected by a licence, which purported to be dated on the 8th of *October* 1812; but, from an affidavit brought in on the part of the captor, it appeared that the licence, upon which the claimant relied for protection, had been granted by the privy council on the 8th of *September*, and not on the 8th of *October*. In consequence of this affidavit, the judge assigned the claimant to exhibit farther proof as to the destination of the cargo, and to account for the alteration appearing to have been made in the date of the licence. An affidavit made by the *Danish* shipper was now offered, in which it was stated that he purchased the licence at *Copenhagen*, in the presence of two merchants, and that, if any alteration had been made in the licence, it was so done before it came into his possession; that he was totally ignorant of any such alteration, and that he had paid a high price for the licence, conceiving that it was in all respects complete and regular. This statement was corroborated by the evidence of the two merchants who were asserted to have been present when the licence was purchased.

JUDGMENT.

Sir *W. Scott*—In this case two demands were made by the Court on a former day; first, the production of a letter

The LOUISE CHARLOTTE DE GULDENERON.

November 4th. 1813.

ter afferted to have been written by Meſſrs. *Armſtrong* and Co.; and, ſecondly, an explanation with reſpect to the falſification of the licence, which purports to be dated on the 8th of *October*; on which day it appears that no ſuch licence was iſſued, though there was a licence to the ſame effect granted on the 8th of *September*.

With reſpect to the letter, and its non-arrival, no ſatisfactory explanation has been afforded to the Court; but it may be, that it has miſcarried, in conſequence of the difficulties to which all foreign correſpondence is now expoſed. I ſhall therefore not lay any great ſtreſs upon the deficiency of the caſe in this reſpect.

The other objection is of greater weight, and is entitled to the moſt ſerious cōnſideration of the Court. It appears very certain that the date of the licence, under which the preſent claim is made, has been altered, and conſequently that the licence itſelf muſt become a mere nullity. It is ſaid, however, that although there may have been a fraudulent alteration in the date of the licence; yet the preſent holders, who were entirely ignorant of that alteration, and who purchaſed the licence at a large price in the market overt, ought not to be the ſufferers. But there are many caſes in which it is unavoidable that an innocent man ſhould ſuffer for the fraud of others. If I take adulterated money, it is every day's experience that I ſuffer for it by loſs, though no party to the fraud. In the preſent caſe, I profeſs that I do not ſee how it is poſſible to produce ſufficient evidence to ſatisfy the Court that the individuals claiming the benefit of the licence for the protection of their property, were not themſelves guilty,

The Louise Charlotte de Guldeneroni.

November 4th, 1813.

or at leaſt cognizant of the fraud which has been committed. Where a licence, admitted to be adulterated, is relied upon, the denial of the party himſelf, even upon oath, cannot be deemed ſufficient to exonerate him from the reſponſibility to which he is liable, ſo far as the validity of that licence for any beneficial purpoſe is concerned. It is ſaid that the Court might, in this caſe, be furniſhed not only with the affidavit of the party himſelf denying all knowledge of the alteration that has been made, but likewiſe with the evidence of two diſintereſted perſons, who were preſent when the licence was purchaſed in its preſent ſtate, for a valuable conſideration. But I do not think that this would be ſufficient to remove the difficulty. The whole tranſaction of the purchaſe and ſale might be merely oſtenſible, and have been arranged before-hand between the pretended buyer and ſeller. There is hardly any evidence that would ſatisfy the Court, that the alteration of the date might not be the act of the party himſelf, by whom the benefit of the licence is claimed; and, though it is not at all neceſſary for me to infer fraud againſt the party now before the Court, I muſt, for the ſake of guarding againſt fraudulent acts of this kind, adhere to the general rule, that the party claiming the benefit of a licence muſt ſhew a licence unimpeached. Take the facts, however, to be proved as ſtated, that the matter paſſed in the preſence of others, and that a *bonâ fide* purchaſe was made, The party would in that caſe be entitled to his remedy againſt the perſon from whom he purchaſed. If any other rule than that which I have laid down were permitted to prevail, the conſequence would be, that a door would be opened to the indefinite extenſion of licences; for they might then be prolonged at will not only

The LOUISE CHARLOTTE DE GULDENERONI.

November 4th, 1813.

only by the hoſtile government itſelf, but by every perſon reſident in the enemy's country. The preſent caſe may be one of great hardſhip upon an innocent individual; but I cannot take upon myſelf to ſay that a licence which has been vitiated in ſo material a point can be deemed valid; and I therefore feel myſelf under the neceſſity of pronouncing a ſentence of condemnation.

GEORGE THE THIRD, SCOTT.

November 12th, 1813.

Foreigners hired to take care of a cargo of mules on board a Britiſh ſhip are not to be deemed part of the crew within the proviſions of the navigation laws requiring Britiſh Ships to be manned by a certain proportion of Britiſh ſeamen.

THIS veſſel ſailed from the port of *Falmouth* in *Jamaica*, on the 13th of *January* 1811, bound to *Puerto Cavallo* on the *Spaniſh Main*, where ſhe arrived and took on board a cargo of mules, with which ſhe returned to *Montego Bay*, and was there ſeized by the collector of his Majeſty's cuſtoms.

On the 27th of *April* a libel was filed in the vice-admiralty court of *Jamaica*, pleading the ſeveral navigation acts, from the 12 *Car.* 2. c. 18. to the 43 *G.* 3. c. 64. incluſive, and alleging that more than three-fourths of the crew by which the ſhip was navigated were foreign ſeamen, contrary to the form of the ſtatutes, &c.

On the 24th of *May* a claim was given on behalf of *Britiſh* merchants.

On the return of the ſhip to *Montego Bay* there were 42 perſons on board; 30 mariners, beſides the maſter and 11 foreign muleteers, who were ſhipped with the cargo at *Puerto Cavallo*. Six of the ſeamen including the maſter were clearly *Britiſh* ſubjects, two others of them were of rather doubtful national character, and

The GEORGE THE THIRD.

Nov. 12th, 1813.

the reſt were admitted to be foreigners. It appeared that two other *Britiſh* ſeamen, who compoſed a part of the original crew, had been impreſſed out of the ſhip after the voyage had commenced.

A ſentence of condemnation was paſſed in the Court below, from which the preſent appeal was proſecuted.

JUDGMENT.

Sir *W. Scott.*—I cannot feel myſelf diſpoſed to concur in the ſentence of condemnation which has been paſſed on this ſhip, as not having had a ſufficient number of *Britiſh* ſeamen on board. By the navigation laws of this kingdom, which were paſſed in the reign of *Charles* the Second, it is, amongſt other regulations, provided, that *Britiſh* ſhips ſhould be manned by a very large proportion of *Britiſh* ſeamen. In time of war, however, it has been found neceſſary that the ſyſtem ſhould be in ſome meaſure departed from, becauſe it then becomes neceſſary that *Britiſh* ſeamen ſhould be employed in the King's ſervice againſt the enemies of the country; and, when this ſtate of things takes place, the commercial navigation of the country muſt be in part committed to the agency of foreign ſeamen. The ſtrictneſs of the original law has therefore been occaſionally relaxed, and the rule with reſpect to the number of *Britiſh* ſeamen has been modified at different times, according to the different exigences of the public ſervice; the laſt ſtatute which was paſſed relative to this ſubject requiring only one fourth of the crew to be *Britiſh* ſeamen.

The queſtion is, Whether the crew on board this veſſel is ſufficiently *Britiſh* to ſatisfy the demands of this act of parliament; and I am clearly of opinion that it is. The cargo conſiſted of 243 mules; and it appears

The GEORGE THE THIRD.

Nov. 12th, 1813.

appears that a number of perſons were put on board the ſhip for the purpoſe of taking care of them, as it is quite neceſſary there ſhould be, the mariners themſelves being wholly unfit for ſuch a ſervice. It is neceſſary that the perſons employed to take care of the mules ſhould be uſed to the care of ſuch animals; and I muſt ſuppoſe that it is uſual to employ for this purpoſe perſons who have likewiſe ſome little experience of the ſea; becauſe, if they were wholly unaccuſtomed to that element, they might probably, from the infirmity to which landſmen are ſubject in ſuch a ſituation, be incapacitated from attending to the buſineſs for which they were engaged. In like manner, I preſume, that perſons not wholly unuſed to the ſea are employed in the care of race horſes, which are frequently exported from this country to the *Weſt Indies*. It is true that the perſons engaged in the care of theſe mules are called *mariners*; but the meaning of that term, as it is here uſed, is, I preſume, that they are perſons not wholly unaccuſtomed to ſea-voyages: They may, I think, be conſidered as a ſort of *marine grooms*. They were engaged for the care of the mules only, the crew being of themſelves competent to manage the buſineſs of the ſhip without their aſſiſtance; and it is not the mere act of now and then pulling a rope, or aſſiſting in a way that any other man of ſufficient ſtrength and activity might do, that will alter the character of theſe perſons, and occaſion them to be conſidered as belonging to a different claſs from that in which they would otherwiſe be ranked. To ſay that men of this deſcription are not to be taken on board a *Britiſh* ſhip, would be in effect to ſay that a cargo of this kind ſhould not be at all carried; for the ſafe conveyance of it would be almoſt impoſſible without

ſuch

The GEORGE THE THIRD.

Nov. 12th, 1813.

ſuch aſſiſtance. Any attempt to evade the ſtatute would certainly require to be moſt ſtrictly watched; but I ſee nothing of that ſort in the preſent caſe, nor is there any reaſon to ſuſpect that there has been a confuſion of offices fraudulently contrived for the purpoſe of eluding the proviſions of the act of parliament.

Having then diſpoſed of this part of the caſe, I proceed to ſee how it ſtands in other reſpects; and I muſt ſay that there appears to have been a ſufficient, or rather a more than ſufficient, number of *Britiſh* ſeamen than is required by the law as it now ſtands. The only doubt that can be raiſed ariſes upon the paper which is called the muſter-roll. Reſpecting this paper, a very different hiſtory is given by the witneſſes on one ſide and on the other. The Cuſtom-Houſe officer ſays, the mate gave it to him: but the account given by the mate himſelf is very different. He ſays, the Cuſtom-Houſe officer produced it to him for his ſignature; but as to the manner in which he got it, or whence it came, he profeſſes an entire ignorance. There is certainly ſome confuſion with reſpect to this paper, which does not appear to be entitled to much credit; for it ſtates facts which are perfectly unfounded, and which muſt have been known ſo to be by the mate at the time when he ſigned it. It contains the name of a man who was not on board the ſhip when it ſailed, and altogether omits the names of two others who were on board. It is a paper, therefore, ſo manifeſtly untrue, that it betrays itſelf by its own vices, and would certainly not have been ſigned by the mate if he had been allowed the neceſſary time for the examination of its contents.

Then how ſtands the caſe upon the parole evidence? Why, the Cuſtom-Houſe officers ſay, that, upon the

men

men being muſtered, only ſix of them declared themſelves to be *Engliſh*, and that the others ſaid they were foreigners. One of the witneſſes ſtates, that the men were warned that the perſons examining them were not impreſs-officers; but the ſeamen might perhaps ſtill ſuſpect the fact to be otherwiſe, and might for the moment think it prudent to diſavow their country. Can I put ſuch declarations, made under ſuch impreſſions, againſt evidence given upon oath, and containing a detailed account of their families and domicils? With reſpect to the two men who were impreſſed into the King's ſervice, they come clearly within the exception of the ſtatute. Being called into the military ſervice of their country, and removed by the mere caſualties of the war, their abſence is ſufficiently accounted for. It appears that all due diligence was uſed to procure a ſufficient number of *Britiſh* ſeamen; and though ſome of thoſe who were at firſt taken on board were afterwards removed by civil proceſs, yet there were ten left, who are, I think, fairly to be conſidered as *Britiſh* ſubjects; at leaſt to the extent of exonerating this veſſel from forfeiture. I ſhall, therefore, reverſe the ſentence pronounced by the Court below; but I ſhall, under the particular circumſtances of the caſe, allow the ſeizor the coſts of the appeal.

Nov. 12th, 1813.

FREUNDSCHAFT, Kock.

The expiration of the licence will not juſtify the capture of a ſhip on her return voyage after a delivery of her cargo in a *Britiſh* port.

THIS was the caſe of a *Daniſh* veſſel, captured in the *North Sea*, on the 22d of *May* 1813, having previouſly delivered a cargo of corn in *London*, under the protection of a *Britiſh* licence. The licence had expired on the fourth day of the preceding month of *December*; and as no objection was now made to the reſtitution of the ſhip, the only queſtion for the deciſion of the Court was, Whether the captors were intitled to the allowance of their expences.

For the Captors, the King's Advocate and *Adams* contended, That the capture was juſtified by the expiration of the licence, and the negligence of the claimants in not uſing due diligence to bring the cargo to *Great Britain* within the time preſcribed.

For the Claimants it was ſaid, That when the ſhip had fulfilled her engagement, by bringing her cargo to the port of deſtination, the expiration of the licence was immaterial, and that the return-voyage ought not not to have been interrupted. That the documents on board made it clear that the ſhip had come to this country under the protection of a licence, and that there was not the ſlighteſt ground for the capture.

Court.—Being of opinion that the capture ought not to have been made, I ſhall certainly not allow the captors their expences. All that I have heard urged in the way of juſtification is, that there had been delay in carrying the tranſaction into effect. The time which had been loſt appears to me to be ſufficiently accounted for; but, ſuppoſing there had been any improper

proper delay in the earlier part of the voyage, I am of opinion that the fault was effectually purged by the arrival of the ſhip, and the delivery of a cargo in a port of this country. If perſons will lay their hands on a veſſel ſo circumſtanced, I ſhall certainly not indemnify them.

The Freundſchaft.

Nov. 12th, 1813.

Captor's expences refuſed.

LOUISA, HIGGINBOTHAM.

Nov. 12th, 1813.

THIS ſhip and cargo, bound on a voyage from *Quebec* to the iſland of *Madeira*, were captured on the 15th of *December* 1812, by the *American* privateer *Decatur*, and re-captured on the 11th of *January* 1813, by His Majeſty's ſhip *Andromache*. At the time of the re-capture, the ſhip was in a diſtreſſed condition, with her main-top-maſt and main-fore-maſt gone; the former having been carried away in a gale of wind. A jury main and fore-top-maſt were put up with ſpars ſent from on board the *Andromache*, and the veſſel was taken in tow for ſeveral days. A prize-maſter was afterwards put on board, with orders to proceed to the firſt port in *England*; but the ſhip having twenty-four inches of water in the hold, and the crew being exhauſted, it was found impoſſible to reach an *Engliſh* port. The veſſel was therefore taken into *Corunna*, where the cargo was diſpoſed of, under the authority of the *Britiſh* vice-conſul.

Civil ſalvage is due to a King's ſhip for ſervices rendered to a veſſel in diſtreſs, in addition to military ſalvage for recapture from the enemy.

JUDGMENT.

Sir *W. Scott.*—The firſt queſtion to be diſpoſed of in this caſe is, Whether civil ſalvage is to be given to the

The Louisa.

Nov. 12th, 1813.

the king's ſhip, in addition to the military ſalvage, to which ſhe is entitled under the ſtatute. The act of parliament, contemplating military ſalvage only, gives to the re-captors the ſame rate of reward, whether the ſervice has been eaſily effected or not, whether the enemy abandoned the property without a conteſt, or whether the re-capture of it was attended with danger, or even with the loſs of part of the crew. It may, however, happen that a ſhip may be reſcued not only from the hands of the enemy, but likewiſe from the dangers of the ſea, and thus a civil may be combined with a military ſalvage. Under ſuch circumſtances, more particularly in caſes where, ſuppoſing no military ſalvage to be due, a claim for civil ſalvage alone might with juſtice have been made, the Court has thought itſelf at liberty to go beyond the proportion limited by the act of parliament, and to give an additional reward to the ſalvors as for a ſeparate ſervice.

Upon the preſent occaſion I have to regret that the circumſtances of the caſe are very imperfectly brought to the notice of the Court. From the evidence which is furniſhed, it is not very apparent what is the exact amount of the ſervice which has been performed; but it does, I think, ſufficiently appear that the ſhip was in a very diſtreſſed condition; that her main-maſt and fore-top-maſt were gone; and that there was a contribution of aſſiſtance from the king's ſhip, which occaſioned the preſervation of the veſſel. The ſhip muſt be taken to have been in a ſtate of conſiderable danger from her own condition; and though it is certainly the duty of King's ſhips to afford aſſiſtance to all His Majeſty's ſubjects whom they may meet with in diſtreſs, yet I do not know that it is incumbent upon them, at the hazard perhaps of their lives, and with-

The Louisa.

Nov. 12th, 1813.

out any proſpect of reward, to take charge of a ſhip in a ſinking ſtate. Any heſitation in affording aſſiſtance might be of dangerous conſequence to the property of perſons ſo circumſtanced; and it is therefore proper, for the encouragement of prompt and ſignal exertions, on the part of the King's officers and men, to hold out to them the proſpect of reward. It appears that, ſubſequent to the re-capture from the enemy, the ſhip, being in danger, was taken in tow for ſeveral days by the *Andromache*, and that a prize-maſter was then put on board, and, as I preſume, ſome other men, in order to make up a competent crew, who aſſiſted in navigating the ſhip into port. The captain of a man of war is not bound to put himſelf or his men in danger to preſerve a merchant ſhip from ſinking; and I do not know that he is bound to take her in tow. He did ſo, in this inſtance, for as long a time as any aſſiſtance of that kind was required; and although the ſervice which has been performed is not of the higheſt degree of merit, it is not to be too lightly eſtimated. Upon the whole, I ſhall allow one ſixth part of the value of this ſhip and cargo to the ſalvors, conſidering that the proportion beyond that to which they would have been entitled under the Act of Parliament is juſtly due to them, as a remuneration for their ſervices in preſerving the property from the perils of the ſea.

With reſpect to freight, I am of opinion, as well upon the equity of the caſe as upon the * authority which has been cited, that none is due, the voyage having been totally defeated by the ſale of the goods at *Coruna*.

* Hunter againſt Prinſep and others, 10 Eaſt. 378.

Nov. 26th, 1813.

SWIFT, BEGBIE.

The navigation laws are not binding upon the King so as to prevent the conveyance of public stores from one colony to another.

THIS vessel, under *British* colours, arrived at the Bay of *Honduras* on the 29th of *July* 1810, and having discharged her cargo, which consisted partly of Government stores, was there chartered by Mr. *Edwards*, the assistant-commissary, to take back from *Honduras* to *Jamaica* the present cargo, consisting of 100 *India* half puncheons of beef, 71 *India* half puncheons, and 51 tierces of pork, 67 barrels of peas, and 21 barrels of flour, for the use of His Majesty's forces at *Jamaica*. The above-mentioned provisions had been originally sent from *Great Britain* to the Bay of *Honduras*, for the use of the troops there stationed; but, being more than were necessary for their use, and being likely to perish before they could be wanted for consumption, it was thought adviseable to send them on to *Jamaica*. The ship sailed pursuant to the charter-party, and arrived in the harbour of *Kingston* on the 8th of *October*, when she was seized by the waiter and searcher of His Majesty's customs for that port, and was proceeded against in the Vice Admiralty Court as a forfeiture, under the statute 15 *Car.* 2. c. 7. intitled "*An Act for the encouragement of trade;*" by which statute it is enacted, (s. 6.) "That from and after the "five and twentieth day of *March* 1664, no com-"modity of the growth, production, or manufacture, "of *Europe* shall be imported into any land, island, "plantation, colony, territory or place, to His Majesty "belonging, or which shall hereafter belong unto, or "be in the possession of His Majesty, His heirs, and "successors, in *Asia*, *Africa*, or *America*, but what "shall

" ſhall be *bonâ fide* and without fraud laden and " ſhipped in *England*, *Wales*, or the town of *Berwick* " *upon Tweed*, &c. &c. and which ſhall be carried " *directly* thence to the ſaid lands, iſlands, plantations, " colonies, territories, or places, and from no other " place or places whatſoever, any law, ſtatute, or " uſage, to the contrary notwithſtanding; under the " penalty of the loſs of all ſuch commodities of the " growth, production, or manufacture of *Europe*, as " ſhall be imported into any of them from any other " place whatſoever, by land or water; and if by " water, of the ſhip or veſſel alſo in which they were " imported, with all her guns, tackle, furniture, am- " munition, and apparel; one third part to His Ma- " jeſty, his heirs and ſucceſſors; one third part to the " governor of ſuch land, &c. into which ſuch goods " were imported, if the ſaid ſhip, veſſel, or goods, be " there ſeized or informed againſt, and ſued for; or " otherwiſe that third part alſo to His Majeſty, his " heirs and ſucceſſors; and the other third part to " him or them who ſhall ſeize, inform, or ſue for " the ſame, &c."

The ſhip was claimed by Mr. *Gatty* of *Jamaica*, as the property of himſelf and another *Britiſh* merchant; a claim was likewiſe given for the cargo by the acting deputy commiſſary-general at *Kingston*, as the property of His Majeſty.

The cauſe came on for hearing in the Vice-Admiralty Court at *Jamaica*, when the Judge condemned the ſhip and cargo.

From this ſentence the preſent appeal was proſecuted.

Swabey and *Luſhington*, on behalf of the Seizor, objected that the ſentence, with reſpect to the ſhip, had

The SWIFT.

November 26th, 1813.

not been duly appealed from: That the owner of the ſhip, for whom a ſeparate claim was given in the Court below, had acquieſced in the ſentence; and that the Crown having, in the firſt inſtance, claimed the cargo only, had no right to proſecute an appeal for the ſhip and cargo.

The *King's Advocate* ſtated, that the inhibition applied both to the ſhip and cargo.

The Court over-ruled the objection.

For the Reſpondent, *Swabey* and *Luſhington* then contended, That the navigation laws, which prohibit the tranſportation of goods, the growth and produce of *Europe*, from one colony in *America* to another, were as binding upon the King as upon any of his ſubjects. That all acts, made for the public good, include and bind the King, though not particularly named therein. *Adlington* v. *Cann and Andrews* (3d *Atkins*, 141.) *Rex* v. *Lady Portington* (1ſt *Salkeld*, 162.) 1ſt *Blackſ. Com.* 262. 5 *Co.* 14. *Bacon's Abr.* vol. 5. 559. tit. *Prerogative*, and the caſes there cited. That the ſtatutes for the encouragement of trade and navigation are for the public good, and therefore binding upon the King. That the King can only diſpenſe with ſtatutes which regard his own perſonal benefit, and not thoſe which relate to the public weal; and that he has no power to remit penalties where the party ſuing is entitled to a ſhare of them. That even if the Crown poſſeſſed the right of diſpenſing with theſe ſtatutes, its power had not been properly delegated in this inſtance, in which the offence proceeded from the unauthoriſed act of an inferior officer. That a right in the King to diſpenſe, either *per ſe* or by delegation, with ſtatutes of this kind, might be liable to great abuſe; and that the whole benefit of the navigation laws

The SWIFT.

November 26th, 1813.

laws might be loſt, particularly if it was held that every ſubordinate officer was inveſted with a diſpenſing power. Upon theſe grounds it was ſubmitted, that the conveyance of ſtores from one colony to another was contrary to the proviſions of the navigation laws: and, to ſupport this interpretation, great reliance was placed on the caſe of *Foſter qui tam* v. *Herries* * *and others*, before the Court of Exchequer, where

* The following is a copy of the ſhort-hand writer's note of the ſumming up on the trial of this cauſe before a ſpecial Jury in the Court of Exchequer, 24th *June* 1782.

Lord Chief Baron Skynner.

Gentlemen of the Jury,

THIS is an information which is brought for the purpoſe of condemning ſome foreign brandy which is charged to have been imported in a veſſel called *The Johanna Maria*, from parts beyond the ſeas; the ſhip ſo importing at the time of the importation not belonging to the people of this country as the true owners and proprietors thereof, and the maſter and three-fourths of the mariners not being *Britiſh*, or being a ſhip or veſſel not built in the country or place of which the goods were the growth, production, or manufacture.

Gentlemen, this act, which is called the act of navigation, was made for the encouragement of our own ſeamen and ſhipping; the queſtion is, whether this brandy was imported in ſuch a ſhip as to cauſe a forfeiture or not. It is neceſſary I ſhould tell you, that bringing goods into port with an intent to land them conſtitutes an importation, though they ſhould be ſeized before they are actually landed. I take that to be the true definition upon this caſe of an importation. Gentlemen, according to that direction of mine, you will be pleaſed to attend to and conſider the evidence which has been given.

On the part of the proſecution, the firſt witneſs called is *Thomas Duke*. He ſays, that this ſhip came into the harbour of *Cowes* upon *Saturday* the 7th of *April* 1781; that he went on board her the next morning, which was *Sunday*; that ſhe was then in the

The Swift.

November 26th, 1813.

where brandies imported from *France* for the uſe of the victualling-board were held liable to confiſcation,

---

road of *Cowes*, and within the port; that the maſter was gone on ſhore, the mate who had the care and command of her was then in the ſhip. He ſaid, ſhe came from *Bourdeaux* with brandy, and was bound to *Cowes* harbour, to Mr. *Mackenzie* who lived at *Cowes*, with this cargo; he ſaid, the ſhip was a *Pruſſian* or *Ruſſian*.

This witneſs ſaid, upon his croſs-examination, that he ſaw the maſter the next morning, and that the maſter told him he was bound to Mr. *Mackenzie*; that three or four days after he aſked him why he did not go into harbour, and the anſwer the maſter gave him was, that he waited for a letter from *Oſtend* for orders. On the *Saturday* following he told him he was bound to *Portſmouth* for Government; this was the day before ſhe went into *Portſmouth* harbour; there was no reaſon, he ſays, why ſhe might not have gone to *Oſtend* or *Altona*, as the winds were favourable. She went in on the 15th, and was ſeized in the harbour on the 25th; ſhe came into harbour in the middle of the day, and ſhe had two officers on board.

The next witneſs is *William Drane*, who ſays he is an officer of the cuſtoms ſtationed at *Portſmouth*; that this ſhip came into the harbour on the 15th of *April*; he ſays he was put on board her, and that the maſter told him his cargo was for Government. He ſaid he was going to Mr. *Lindegren*, who is an agent for ſhipping at *Portſmouth*, for orders; when he came back, he ſaid Mr. *Lindegren* was not at home; the next day he went on ſhore again, and when he returned, he ſaid he could do nothing without an order from *London*; he ſays, that three or four days after ſhe came into the harbour ſhe was moored head and ſtern in the mud; he ſays, the captain pointed to the King's quay, where he ſaid his cargo was to be landed, it being for the uſe of the King's ſhips; this he ſaid he told him two or three days after ſhe came into the harbour. The captain ſaid he came from *Bourdeaux* and laſt from *Cowes*; that he had taken in his cargo at *Bourdeaux*; that it was a *Pruſſian* veſſel belonging to *Staten*; that the cargo belonged to Meſſrs. *Herries*, one of whom lived at *Oſtend* and the other in *London*. The cook of the ſhip ſaid, in the preſence of the mate, who was at that time the commanding officer, the captain being abſent, that a part of the ſhip be-

belonged

fiſcation, for a breach of the ſtatute, prohibiting the importation of *French* commodities into *England*.

The SWIFT.

For *November* 26th, 1813.

longed to his ſiſter who lived at *Staten*; and this being ſaid in the preſence of the party who had the command, and not contradicted by him, the admiſſion of this is evidence of the truth of it; he ſaid the mariners were ſome *Pruſſian* and ſome *Dutch*.

Upon his croſs-examination he ſays, he remained on board this ſhip a conſiderable time while ſhe was in the harbour, and that ſhe remained moored till orders came from *London*; ſhe was moored for the purpoſe of waiting in a ſafe place till theſe orders came.

The next witneſs is *David Mullinhall*, who ſays, he is now the mate of the ſhip, but at the time in queſtion he was the cook on board. He remembers that in *April* 1781 ſhe was in *Portſmouth*; that he came from *Bourdeaux* in her; ſhe was built at *Staten*; that the owners were all of them *Pruſſians*, and the crew were all *Pruſſians*, excepting two who were *Swedes*; that ſhe arrived firſt at *Cowes*, and went afterwards to *Portſmouth*. He ſays, the cargo was *French* brandy taken in at *Bourdeaux*; that he knows nothing, nor he believed did any of the crew, about the cargo, otherwiſe than that it was to be landed at *Portſmouth*, they having waited for orders at *Cowes* for that purpoſe; he had orders to go from *Cowes* to *Portſmouth*, and the captain publicly ſaid he was to wait at *Cowes* for orders, and that when the orders came the captain as publicly ſaid he was to go to *Portſmouth*, and he took pilots on board to carry him to *Portſmouth*. He was aſked, whether ſhe could have been unloaded at her mooring place; he ſaid no, ſhe could not, unleſs it was by a lighter.

This is the evidence on the part of the proſecution, which proves that this cargo, which is *French* brandy, came from *Bourdeaux* in a *Pruſſian* ſhip with *Pruſſian* ſailors; ſo far it is contrary to the expreſs directions in that clauſe in the act of navigation which, under ſuch circumſtance, declares the ſhip and the cargo to be forfeited.

On the part of the defendant it is ſaid, that this ſhip ought not in fact to be forfeited, for though it be admitted that a ſhip under ſuch circumſtances coming into an harbour with an intent to break bulk, does occaſion a forfeiture of the cargo; yet in the preſent

The Swift.

November 26th, 1813.

For the Crown, the King's Advocate and *the Advocate of the Admiralty* argued, That where a ſtatute is

---

caſe the parties did not intend to break bulk, for they came with a cargo of brandy for Government, and they waited at *Cowes*, in order to ſee whether they could have ſuch a direction, and ſuch a ſanction for the landing this cargo as ſhould make it legal, and exempt this ſhip from forfeiture, and if that could not be obtained, then the ſhip was to proceed on her voyage. Now for this purpoſe different witneſſes have been examined. The firſt is,

Lord *North*, who ſays, he remembers that in 1781 Sir *Robert Herries* on behalf of himſelf and his houſe applied to the Treaſury, repreſenting that as the price of rum was then very high, and would be ſtill higher on account of a monopoly then apprehended, they propoſed and offered to be ready to furniſh the Victualling Office with foreign brandy at a ſuch price, as that a very conſiderable ſaving would be made to the public; he believes it was to be a ſaving of about cent. per cent. which was about £100,000. He ſays this application was made by them in conſequence of a recommendation which had been made from the Treaſury ſome years before to furniſh foreign brandy inſtead of rum; and his Lordſhip ſays, to the beſt of his recollection, the Treaſury referred the memorial to the Lords of the Admiralty, who reported their opinion very ſtrongly in favor of the meaſure; and in conſequence of that, the propoſal was ſent to the Commiſſioners of the Victualling Office, they being the perſons to contract for ſuch a commodity, with a recommendation from the Treaſury. He was aſked if there is not uſually a receſs of the Treaſury Board at *Eaſter?* he ſays there is; they generally adjourn about *Thurſday* preceding the *Eaſter Sunday* for about ten days.

Upon his croſs-examination his Lordſhip ſays, this propoſition was made generally; that when any quantity of rum is wanted the Commiſſioners of the Victualling apply for an order from the Treaſury that it may be exempted from the duty.

The next witneſs is Mr. *Woodroofe*; he produces the charter-party which is in *Dutch*, but a tranſlation of it is read, which appears ſigned by *Frederick Groth*, who is the captain, and it contains an agreement for a voyage for *Altona* or *Oſtend*, but to go to *Cowes*,

and

is general, whereby any prerogative or right of the Crown is diveſted or taken away from the King, in ſuch

The SWIFT.

November 26th, 1813.

---

and to wait there three days to receive orders to proceed to *Altona* or *Oſtend*, dated *Bourdeaux*, 13th *February* 1781.

The next witneſs is Mr. *Bate*, a commiſſioner of the victualling board; he ſays, that upon the 15th of *January* 1781 an application was made to the victualling office by Sir *Robert Herries* and Company relative to the importation of foreign brandy, which contained an offer of 150,000 gallons of brandy at 3s. *per* gallon; this offer not having been accepted, upon the 26th of *January* it was repeated at a reduced price, though no particular price was then named, and they propoſed to extend the quantity as far as to 6 or 700,000 gallons. They likewiſe made a propoſal to execute the order upon commiſſion if the victualling board choſe rather to treat with them in that manner, and become themſelves the principal perſons contracting; neither of thoſe propoſals made in *January* were accepted. That on the 7th of *February* the offer of 150,000 gallons was repeated, but they ſaid they could not reduce the price, unleſs a larger quantity was ordered; and if a larger quantity was ordered then the price was to be 2s. 6d. a gallon; this offer was not accepted.

On the 4th of *April* they offered 350,000 gallons at 2s. 6d.; that likewiſe was not accepted; and upon the 9th of *April* (at this time you will recollect the brandy had arrived at *Cowes*) they offered 70,000 gallons at 2s. 6d. a gallon; this was not accepted. Upon the 11th of *April*, two days after, an offer was made in the name of the houſe of *Rabone* and *Cruiſoz* of 50,000 gallons, at 2s. 5d. a gallon.

This it ſeems was the brandy in queſtion, and this offer was accepted upon the 13th, and he ſays, it was preſented to them as brandy, which was at that time at *Cowes*. He ſays, that they repreſented this immediately to the Lords of the Admiralty in order that through them, they might obtain an order from the Treaſury, that this brandy might be landed duty free. He ſaid, that they knew nothing at all reſpecting the importation of this brandy, there was no application to them about ſecuring it previous to its importation; they knew nothing about that till it was repreſented to them to be at *Cowes*.

Mr.

The SWIFT.

November 26th, 1813.

ſuch caſe the King ſhall not be bound, unleſs the ſtatute is made by expreſs words to extend to him (*Bacon's*

Mr. *Hanway*, one of the commiſſioners of the victualling board, ſays, that in the beginning of the year 1781, Sir *Robert Herries* and company made ſeveral propoſals to the victualling board to ſupply them with foreign brandy; his offers were thought to be too high in price, and his terms rather too ambiguous reſpecting the time of the delivery, ſo they did not care to cloſe with the offer, becauſe he ſaid it was very ſatisfactory to them, to be ſure that the commodity would be delivered to them at the time it was fixed. After this came the offer of *Rabore* and *Cruiſoz*, which being lower than the others they accepted; and on the 13th of *April* they completed the contract; but theſe contracts are always made upon condition that the Admiralty will obtain warrants from the Treaſury, to have the delivery duty free. Mr. *Hanway* ſays, that the exigencies of the times have made it neceſſary for them to buy a vaſt quantity both of rum and foreign brandy, and he ſays, they never dream about an importation in the legal ſenſe of the word, they never think about it; but they think it is landed under the guardianſhip of the cuſtoms and exciſe, in order to be expended in the king's ſhips of war; and he ſays, the victualling board have made many contracts in ſimilar circumſtances to the time that this contract was made, but ſince that they have not made any for brandy that was actually in port; he is aſked, whether he remembers any particular contracts made under theſe ſame circumſtances, he ſays he does not.

The next witneſs is Mr. *Mackenzie*; he ſays, he is a merchant at *Cowes*; he had a notification of a ſhip coming from *Bourdeaux* on the 11th of *March* 1781, which notification was by a letter from Sir *Robert Herries*, which letter was dated the 9th of *March* in that year; it was written from *London*, and imported to be information to him that a *Pruſſian* ſhip called the *Johanna Maria* was engaged to load a cargo of brandy on the Imperial account at *Bourdeaux*; that ſhe was deſtined for *Altona* or *Oſtend*; that ſhe was to call at *Cowes* for orders, which of thoſe ports to proceed to. In a ſubſequent part of the letter it was added, that theſe brandies were intended for the victualling office, and if not accepted by them, then they muſt go forward on their deſtination. He ſays, that

(*Bacon's Abridg.* vol 5, 559, 1ſt *Bl. Com.* 261); and that the uſual clauſe of ſaving the King's right is inſerted

The Swift.

November 26th, 1813.

---

that upon this he gave orders to *James Day* to give notice to a pilot to be in readineſs, and to give notice to *Miller* the tide ſurveyor, that this ſhip was expected. He ſays, ſhe arrived on the 7th of *April* late at night, he was informed of it next morning early; ſhe waited in the road of *Cowes*, which is a place where ſhips do very uſually wait until they receive their orders; he has correſponded with Sir *Robert Herries* near twenty years; that he knew this to be a cargo from *Bourdeaux*, and it was to be landed at *Portſmouth* if the victualling office would buy it; he ordered the captain of the ſhip to go into *Portſmouth* harbour, which order he gave by directions received from Sir *Robert Herries*; that ſhe went there for the purpoſe of landing her cargo, for he underſtood by the letter he received the day before ſhe went into the harbour; that the cargo was ſold to the victualling office.

John Miller the tide-ſurveyor at *Cowes* ſays, Mr. *Mackenzie's* clerk *Day* did give him notice of a ſhip coming to *Cowes* with brandy; that he heard of her arrival on the 7th of *April* late at night, he went on board her the next morning; ſhe was bound to *Cowes* with 350 pieces of brandy; the maſter was not on board; that he put officers who continued on board; he ſays, that frequently ſhips come to *Cowes* and ſtay there ſome days for orders.

James Blundell, a partner with Mr. *Mackenzie* ſays, he was not on board the ſhip till after ſhe was ſeized; he ſaw the bill of lading which was produced to *Styles* the officer; that the captain did offer to ſwear to his bill of lading, and *Styles* told him he would do wrong if he did, and would be perjured; that the cargo and ſhip were under ſuch circumſtances he would do wrong if he did.

William Gaſcoigne produces a letter from the victualling board to the board of admiralty dated the 13th of *April* 1781, directed to *Philip Stephens* eſquire, which ſtates an offer of brandy, then ſaid to be lying at *Portſmouth*, and ſubmitting to them whether it ſhould not be bought, and deſiring them to obtain an order from the Treaſury that it might be delivered duty free.

Gentlemen, This is the evidence on the part of the defendant; there is no doubt of this being a foreign ſhip, navigated by a foreign crew, and coming into a port with foreign brandy on board,

and

The SWIFT.

November 26th, 1813.

ſerted *ex abundanti cautela* only. (*Show. P. C.* 179). That there is one ſtatute only which impoſes the penalty of

---

and as ſuch, doubtleſs, contrary to the act of navigation, if in the ſenſe of the words of the act, ſhe did import the cargo. According to my conſtruction, *importing* is coming into port with an intention to land the cargo. But it is ſaid that though this was brought into port, yet there was no intent abſolutely to land the cargo, for this ſhip came there under the faith of Government with a cargo for Government, and under an expectation that therefore the landing of this cargo would be made legal by thoſe perſons who had it in their power to procure ſuch a legal authority to land. Whatever that might be, it is admitted it could be only by act of parliament; and therefore this veſſel being all the time expecting ſuch an authority to land as would make it agreeable to the laws of this country, they could not be ſaid to have intended to have landed this cargo.

It is certainly a ſtrong caſe indeed, coming here upon the faith of the protection of the law of this country; but there ſeems to me to be very weak evidence of any expectation of that kind. What is this caſe? It is a ſhip coming here without any previous communication whatever with any officer of Government, for the purpoſe of ſelling the cargo to the victualling office, and by a perſon who was manifeſtly uſed to this kind of buſineſs, becauſe there appears to be a great deal of treating with Meſſrs. *Herries* and company under whoſe directions the cargo came during the months of *January*, *February*, *March*, and *April*, up to the time of this agreement being made. The agreement was abſolutely completed, as Mr. *Hanway* ſays, provided an order could be obtained to land it duty free; this was on the 13th, and accordingly on that 13th a letter is written from Meſſrs. *Herries* and company which is received on the 14th, ſtating that the cargo was to be carried into *Portſmouth*, and as the witneſs ſaid, he underſtood it was to be landed becauſe the cargo was then ſold. Then the authority which they waited for, as it ſeems to me, was that there ſhould be an order from the lords of the treaſury that this ſhould be landed duty free; there does not ſeem to me to be any other intention in the perſons who had the care and direction of this cargo, but that it ſhould wait in *Cowes* harbour, until it could be ſold, and an order for

The SWIFT.

November 26th, 1813.

of forfeiture of King's ſhips as well as others; and in that it was thought requiſite expreſsly to name them, (7 & 8 *W.* c. 22.) That although the ſtatute, under which the preſent proceedings were commenced, was paſſed "for the encouragement of trade," which it muſt be admitted is for the general good, yet it will not on that account bind the King, becauſe the law will not preſume the King to be engaged in trade; and that the preſent tranſaction has no reference to trade, and conſequently is not within the ſpirit and meaning of the ſtatute. That the goods were not purchaſed at *Honduras*, and were not intended for ſale either there or elſewhere, but merely to ſupply the exigencies of the public ſervice, of which the King, as chief magiſtrate, is bound to take care. That the King cannot be included in any of the ſtatutes which preſcribe a forfeiture:

---

for the landing ſhould arrive, and when it was ſold, then an order was ſent for her to come in, and it was to remain there till an order could be obtained from the treaſury for it to be landed without payment of duty; theſe ſeem to me to be the plain circumſtances of this caſe; and if they are, then it is for your conſideration, whether this was or was not an importation of this brandy, under the circumſtances deſcribed by the witneſs, it being a foreign ſhip and navigated with foreign ſailors with an intention to land that cargo in the harbour of *Portſmouth*. If you are of that opinion, undoubtedly the proſecutor is entitled to your verdict; by the terms of the law the ſhip and cargo will be in that caſe forfeited. To be ſure it is truly ſaid, you and I muſt not attend to particular caſes of hardſhip and inconvenience; upon this occaſion the law is poſitive. If you are of opinion that this ſhip did come in with the clear intention of landing her cargo in *Portſmouth* harbour, then that cargo is forfeited; if you think there was no intention poſitively and decidedly to land this cargo in the harbour of *Portſmouth* then you will find a verdict for the defendant.

Verdict for the proſecutor.

First,

The SWIFT.

November 26th, 1813.

First, because such a construction of the law would be indecorous, and would trench upon the respect due to the person and dignity of the King; and, secondly, because it would frequently lead to this absurdity, that the King must forfeit to himself; for the forfeitures incurred by a breach of the navigation laws usually go to the Crown. That if the stores now proceeded against should be confiscated, a large portion of the penalty must be assigned to the King himself, which would give him an interest in the mis-application of the public property. That the Court of Exchequer held, in the case of *Bruce* against Sir *Simon Harcourt*, (*Parker's Reports*, 274.) that goods imported for the use of the Queen's own family, and not in the way of trade or merchandize, were not within the statute (3 & 4 *Anne*, c. 13.) prohibiting the importation of *French* goods into *England*. That the case cited on the other side (*Foster qui tam v. Herries* and others) was of a very different kind, the goods having there been imported by private persons in the way of trade, though with a view of disposing of them to the commissioners of the victualling office. That the mischiefs which seemed to be apprehended from the right of the King to transport public stores without the restrictions imposed upon other species of goods by the navigation-laws, were not likely to ensue, and that it would be indecorous to suppose the King would do any thing which might be injurious to the public welfare. That the Legislature did not appear to apprehend any such mischiefs, since it passed an act (52 *G.* 3. *c.* 100.) allowing the conveyance of commodities from one colony to another. That, on the contrary, great public inconvenience might arise, if the King were not at liberty, upon military expeditions, to remove the

necessary

The Swift.

November 26th, 1813.

neceſſary ſtores in whatever manner, and from whatever place the public ſervice might require. That if *Honduras* was to be conſidered, as it is ſworn to be, a dependency of the iſland of *Jamaica*, then there had been no conveyance of goods from one colony to another, and conſequently no offence had been committed. Upon theſe grounds it was ſubmitted, that the ſentence of the Court below muſt be reverſed.

In reply it was ſaid, that the deciſion of the Court of Exchequer, in the caſe of *Bruce* againſt Sir *Simon Harcourt*, related only to the private property of the Queen coming for the conſumption of her houſehold. That it was ſmall both in bulk and value, and could be of no importance in a national point of view. That the Court would have applied a very different conſideration to the conveyance of public ſtores, which are of greater extent as to quantity, and conſequently of much greater importance to the navigation of the country. That the Legiſlature, in paſſing theſe ſtatutes, deſigned the encouragement of navigation as well as of trade, and with that view directed the trade of the colonies to be carried on in the way which it deemed moſt beneficial to the ſhipping of the mother country. That *a Trading* was not neceſſary to conſtitute an offence within the ſtatute; ſince the importation of goods by an individual for his own conſumption, would be deemed a contravention of the law, though it could not be conſidered *a Trading*; to conſtitute which it is neceſſary that there ſhould be a buying and ſelling. That there was no abſurdity in pronouncing a ſentence of forfeiture, although part of the penalty went to the King; for the penalty being divided between the Crown and the ſeizor, the latter would be entitled to his ſhare, and the portion of the Crown might be remitted,

The Swift.

November 26th, 1813.

mitted. That the general law is not to be annulled, and rendered of no effect, merely becauſe inconveniences might ariſe if the Crown was not permitted to remove ſtores in any way that it might deem moſt convenient. That if the King is not bound by this ſtatute, he would, by the ſame rule, be exempt from the obſervance of the regulations preſcribed by all the other navigation laws, and might proceed to employ veſſels not furniſhed with a *Britiſh* regiſter, not *Britiſh* built, and not manned with *Britiſh* ſeamen; and thus the whole ſyſtem of the navigation-laws would be annulled. That there was no indecency in ſuppoſing ſuch an abuſe might take place, as the impeccability of the King is perſonal only, and not capable of being extended to thoſe acting under him. That *Honduras* was not to be conſidered a dependency of *Jamaica*, the the Court having already decided otherwiſe (*Morne Fortunee**), by condemning under this very ſtatute property ſent from *Honduras* to *Jamaica*.

JUDGMENT.

In this caſe a libel was filed in the Vice Admiralty Court of *Jamaica*, on the 10th of *October* 1810, by

---

* MORNE FORTUNEE, DE CLOS.

THIS was the caſe of ſome military accoutrements which were ſent under contract from this country conſigned to an officer who was ſuppoſed to be at *Honduras*, but happened to be abſent when the ſhip arrived in that colony. The commanding officer at *Honduras* having refuſed to take them in, they were ſent on to *Jamaica* in this veſſel, and were there ſeized and condemned. The caſe came by appeal to the High Court of Admiralty, and it was contended on behalf of the appellant, that the tranſaction was juſtified by the neceſſity ariſing from the refuſal of the officer to receive them. But the Court held that the refuſal to receive them at *Honduras*, did not impoſe a neceſſity of ſending them to a port from which they were by law excluded, and affirmed the ſentence.

John

The Swift.

November 26th, 1813.

John Carr Overend Eſq. againſt this ſhip and the goods on board her, on behalf of the King, the Governor, and himſelf, for importing goods, (beef, pork, peas, and flour,) at the port of *Kingſton*, on the 8th of *October*, contrary to the ſtatutes 13 & 14 *Car.* 2. for preventing frauds, and regulating abuſes in his Majeſty's cuſtoms; and the ſtatute 15 *Car.* 2. for the encouragement of trade.

The facts of the caſe are apparent upon the claim, and are not denied. The ſhip is claimed by *Daniel Gatty*, of *Kingſton*, for himſelf and other *Britiſh* ſubjects; and the cargo is claimed for the King by *Frederick Drennan*, deputy commiſſary-general for the iſland and its dependencies. It is ſtated in the claim, that this ſhip ſailed in the preceding *July* with a cargo of rum, ſhipped by *Drennan*, for *Honduras*, a dependency on the iſland of *Jamaica*, for the uſe of the forces; that ſhe diſcharged her cargo there, and was chartered to *Richard Edwards*, aſſiſtant-commiſſary, to take the preſent cargo, which had been ſent from *Great Britain* to *Honduras* for the uſe of the troops there; but there were more than were neceſſary for the troops, and ſome of them muſt therefore have periſhed before they could have been conſumed. The ſhip which had brought them was directed by the commander-in-chief to proceed with them to *Jamaica*; but ſhe having landed them, and chartered herſelf for a return voyage to *Great Britain*, the commiſſary, who was ordered ſo to direct her, having no controul over that ſhip, did, from a deſire to comply with his inſtructions as far as he could, and for the benefit of the public ſervice, charter the *Swift* to bring theſe goods to this iſland (*Jamaica*), for the troops ſtationed here, which was accordingly done; and the ſhip and cargo

The SWIFT.

November 26th, 1813.

were ſeized immediately on the day of their arrival, though the cargo was intended for the troops only, not for the benefit of any of his Majeſty's ſubjects, nor for any purpoſes of trade.

Theſe facts are fully proved by the documents, the truth of whoſe contents is no more denied than their authenticity. Theſe documents conſiſt of a letter from the Secretary of the Treaſury, informing *Drennan*, the commiſſary at *Jamaica*, that the lords of the treaſury were ſending proviſions for the troops at *Honduras* from *Great Britain*. There is alſo a letter from the acting commiſſary at *Honduras* to Mr. *Drennan*, informing him that the ſupply intended was much larger than could be uſed, and deſiring inſtructions whether it would not be adviſable to diſpoſe of part of them to prevent loſs to the public. There is the anſwer of Mr. *Drennan*, containing the order of general *Morriſon*, that no part ſhould be landed at *Honduras*, but the veſſel to be ordered on with the cargo to *Jamaica*. There is a reply to this, which ſtates that the letter came too late; for the cargo was unſhipped, and that the ſhip was already chartered on a voyage home, and therefore could not be obliged to re-ſhip and come on. There is alſo a letter of a later date, ſtating that the *Honduras* commiſſary had, in order to conform to orders as nearly as he could, ſhipped a quantity of theſe proviſions on board the *Swift*, to the conſignment of the commiſſary at *Jamaica*. Here is a bill of lading and regular invoice, deſcribing the proviſions to be for the ſervice of his majeſty's troops.

There is no queſtion upon theſe facts, that theſe goods were the property of his Majeſty, not in his perſonal capacity, but as procurator and truſtee for the nation;—that they were deſtined to an important pub-

lic uſe, the convenient ſupply of the army;—that they were ſent from a dependent ſettlement to another to which it is ſubordinate, at leaſt for purpoſes of this kind;—that there is a clear abſence of all evil intention or fraud in every ſtage of the tranſaction;—that it moved upon the beſt poſſible motive, that of promoting the public ſervice, and preventing public loſs;—that the proper authorities to gaurantee its integrity were applied to it;—and the ſingle illegality that could be imputed to it, is the fact, that theſe goods were not brought *direct* from *Great Britain* to *Jamaica*, and were therefore tranſported in breach of the law, which has been conſtrued, and by this Court, to prohibit the transfer of goods from one ſettlement to another.

Now it is true that this Court has felt itſelf bound to declare, in a caſe of a voyage from *Honduras* to *Jamaica*, that, by the ſtatutes of *Charles* the ſecond, the tranſportation of goods from one ſettlement to another is unlawful. By a recent ſtatute, paſſed ſince the date of that judgment, this intercourſe is rendered lawful; ſo that no ſuch queſtion can ariſe in the preſent ſtate of the law as that which at the preſent time engages the attention of the Court. But though the Court did feel itſelf compelled, in the caſe of a trading voyage from one ſettlement to another, to pronounce it to be contrary to the true meaning of the ancient ſtatute, yet I cannot but think that the relation which *Honduras* appears to ſtand in to *Jamaica*, on the evidence *now* adduced, and applying to tranſactions of this nature, is not to be entirely and haſtily overlooked. It is here deſcribed throughout as a dependency of *Jamaica*, and ſo it appears to be for the diſtribution of the King's ſtores. For to whom is the treaſury letter addreſſed? Not to the commiſſary at *Honduras*, though the ſtores

The Swift. — November 26th 1813.

were to be there imported, but to the commiſſary at *Jamaica*, as a buſineſs within his proper adminiſtration. What is the commiſſary at *Honduras?* the aſſiſtant of him at *Jamaica*, acting with a mere delegation of his authority. Who gives the orders to the commiſſary at *Jamaica?* General *Morriſon* the commander of the troops at both ſtations, who exerciſes the ſame common power at both places, and iſſues his orders to the commiſſary at *Jamaica* to direct his aſſiſtant at *Honduras:* That aſſiſtant conforms his conduct, as nearly as circumſtances will admit, to the directions ſo conveyed, and gives the account of it to the commiſſary at *Jamaica* as his direct and immediate ſuperior. I am, therefore, inclined to think that whatever might be the ſtate of the law with reſpect to two clearly independent and diſtinct ſettlements, theſe two are too much identified, ſo far at leaſt as purpoſes of this kind are concerned, to be ſo conſidered. *For theſe purpoſes Honduras* appears, by the proofs *now* adduced in the very caſe, to be ſtrictly a dependency—a part of the actual adminiſtration at *Jamaica* for tranſactions of this nature. I own that, if I was compelled to decide this queſtion upon the view of the particular and limited facts, I ſhould feel an inclination to hold that a tranſfer of public ſtores from *Honduras* to *Jamaica* was not neceſſarily ſubject to any rule of law which forbad the transfer of ſuch commodities ſo owned from one diſtinct ſettlement to another.

But, if it is neceſſary for me to conſider it in a more enlarged view, I think I am led to a concluſion different from that which has been drawn by the learned Judge of the Court below. It has been made a queſtion in argument, whether the King is bound by the navigation act. This is a very large queſtion, upon a very

The SWIFT.

November 26th, 1813.

a very momentous ſubject, on which it might not become me to hazard a confident opinion, and the leſs ſo, becauſe the principles on which it is laid down in the books, that the King is or is not bound by ſtatutes, are far from being ſo preciſe as to furniſh a ſafe conduct to any ſuch opinion. That he is bound, though not named, by acts *pro bono publico*—by acts for prevention of fraud—are deſcriptions of the royal obligations ſo wide and ſo unlimited, that it might be difficult to ſay what public ſtatutes do or do not bind the King, if theſe are taken without any technical limitations applied to them. For it would be difficult to ſay what public ſtatutes are not *pro bono publico*, and for the prevention of *fraud*, taking *fraud* in its legal ſenſe, of injury to the rights of others. The utmoſt that I can venture to admit is, that, if the King traded, as ſome ſovereigns do, he might fall within the operations of theſe ſtatutes. Some ſovereigns have a monopoly of certain commodities, in which they traffick on the common principles that other traders traffick; and, if the King of *England* ſo poſſeſſed and ſo exerciſed any monopoly, I am not prepared to ſay that he muſt not conform his traffick to the general rules by which all trade is regulated. But the preſent queſtion is,—Is this diſtribution of the public ſtores for the public uſe, a trading within the view of the ſtatute? Looking to authority, as well as principle, and to the public convenience, I conceive, it is not. It is property to be diſtributed by the Crown for no purpoſe of pecuniary advantage to itſelf, either in its perſonal or political capacity, but ſolely for the exigencies of the public ſervice. The Crown poſſeſſes the conſtitutional power of directing this diſtribution; and ſurely it never could be the intention to conſtitute the Crown a trader by virtue of the fair exerciſe of this admitted

The Swift.

November 26th, 1813.

prerogative conferred upon it, not for its own uſe or advantage, but for the neceſſity of the public ſervice. It has one feature of trade, that of the conveyance of commodities, but it has no other. The conveyance is not for lucre, nor for private domeſtic conſumption, but for the maintenance of the public defence. Indeed, it rather ſeemed to be admitted, that if it had been the immediate act of the Crown, it would not have been liable to much objection, but that it was the act of the Deputy-Commiſſary. The *Crown*, however, has approved and confirmed the act of Its officer, and it is hardly poſſible that It ſhould not approve and confirm an act done in the only way that remained practicable to prevent public loſs and detriment. The Crown has adopted the act, and ſtands by its Law-officers before the Court, maintaining the propriety and legality of the act; and the only party who queſtions it, is the Cuſtom Houſe officer, who is to derive his own private advantage from the forfeiture.

If authority is reſorted to, it tends to ſupport the ſame concluſion. The caſe of *Bruce* verſus Sir *Simon Harcourt* (vide Chief Baron *Parker's Report*, 274,) tends to eſtabliſh, at leaſt in the reaſonings employed, that an importation of commodities bought with the Crown's money, though for the conſumption of the Royal Family, is not to be conſidered as a trading, which it unqueſtionably would be, in the caſe of any private individual. It turned upon the application of a particular act of parliament, (3 & 4 *Ann.* c. 13.) which forbad the importation of *French* commodities; but the determination of a very preponderating part of the Court, (three Judges againſt one,) *after ſeveral arguments of counſel, and much diſcuſſion of the Court*, held that ſuch an importation was not a trading within that Act; and if not a trading within that

The SWIFT.

November 26th, 1813.

Act, I do not see how it could be a trading within any other. For I do not perceive that that act points out any such description of any peculiar species of commerce, as that it should be at all different from the trade that is usually so denominated. And if an importation of goods destined to the domestic consumption of the Royal Family, and purchased with the Crown's money for that purpose, is not a *trading*, (which it unquestionably would be in the case of an importation of goods by any other family made and purchased for its own use,) I do not see how an importation of the Crown's property destined to the public use can possibly be so considered. It has still less the character of trade. It gives no advantage to the proprietor directly or indirectly; no advantage of private profit, or of private use, which is private profit. It is on all account entitled to higher measures of indulgence. To that effect is the letter from the Custom House, returned to the enquires directed by this Court. It is there stated that, "no public stores sent "on Government account to our armies abroad are "included in the commercial accounts of our ex- "ports; but some inconsiderable articles, in the "nature of private supplies, shipped for the use of the "officers, &c. by their friends in this country, are "entered at the Custom House in the usual way, and "charged with duty as merchandize; for the greater "proportion of public stores shipped for the use of the "forces abroad being sent in transports hired by Go- "vernment for that purpose, which do not make "entry at the Custom House, the officers here can "have no knowledge of such shipments; but entries "are made occasionally by the Secretary at War, and "by individual contractors on Government account "of stores shipped in merchant vessels, which, how-

The SWIFT.

November 26th, 1813.

"ever, not being ſubject to duty as merchandize, are "alſo excluded from the accounts of exports." And no doubt the practice is conformable to the opinion ſo expreſſed. And if the property is not liable to duty, it follows as a neceſſary conſequence that it cannot be liable to forfeiture for importation without payment of duty, which I preſume it would be, if ſubject at all to the general laws of importation into the *Britiſh* dominions. It ſhould ſeem that the practice of the Cuſtom Houſe in the iſland of *Jamaica* is apparently different, but *apparently* only, for it muſt be ſubſtantially and finally the ſame; ſo I am bound to conſider it, when I ſee what the practice of the commiſſioners here is, for the Cuſtom Houſe of the iſland of *Jamaica* is bound to conform to the directions of the commiſſioners here, and an act done there contrary to the judgment exerciſed here, would doubtleſs be rectified by their authority. The only caſe bearing a different aſpect, is that of *Foſter* v. *Herries*, which was tried before Lord Chief Baron *Skynner* and a Special Jury, in the Court of Exchequer, in the year 1782. That was a caſe in which brandies imported, as it is ſaid for the uſe of the navy, were forfeited at the ſuit of the ſeizor; and it is the more memorable, becauſe it gave occaſion to an act of parliament that enables the officers of the Crown to ſtay proceedings ſo inſtituted. I have endeavoured to procure an accurate report of the ſumming-up, without obtaining any other than the ſhort-hand writer's report, which is too indiſtinct to furniſh clear and intelligible principles, although there can be no doubt that the ſumming-up itſelf was a moſt juſt and perſpicuous expoſition of the law. Thus much appears in the evidence of facts therein ſtated, that the goods were not the property of the Crown at the time they came

came into a *Britiſh* port, but that they came there the property of individuals on a ſpeculation and hope of their being purchaſed by Government for public uſe: That a treaty was entered into for that purpoſe; but whether concluded at the time of the criminal importation alleged, ſo as to have produced at that time an actual and complete transfer, is more than I can confidently extract from theſe ſtatements: and yet the whole applicability of the caſe turns upon that circumſtance; becauſe, if the goods were not the property of the Crown at the time of the alleged criminal importation, it is a queſtion (if it can be conſidered a queſtion) of a very different nature from that which is limited to the legal nature and privileges of that property which actually and *bonâ fide* belonged to the Crown at the time when that act of importation took place. The verdict in that caſe was for the proſecutor.

Such is the ſtate of the caſes decided in the Court of Exchequer, ſo far as I have been able to collect and apprehend them, and in which I cannot but feel that the ſolemn determination of the judges of that Court in the former caſe, after ſeveral arguments and much diſcuſſion, and reported by that eminent perſon with all the authority which his long ſubſequent experience, and his increaſed learning could confer upon it, very much outweighs what I can, with any approach to certainty, infer from the indiſtinct ſtatements in which the later judgment has been communicated to this Court.

Upon the matter of public policy and convenience, the caſe appears to incline altogether one way,—to the ſupport of the prerogative. Here is the Crown acting as the procurator-general for the ſtate, diſtributing the more neceſſary ſupplies, as the local neceſſities of it

The Swift.

November 26th, 1813.

may require. It may affect the intereſts; it may affect the ſafety of the ſtate, to have this power of prompt and provident diſtribution fettered by the rules that are juſtly impoſed upon the regular courſe of traffick. It is a thing to which ſuch forms not only are inapplicable in their own nature, but may be dangerous in their effects. In this very caſe, what is to be the reſult? Public loſs and detriment counterbalanced by nothing but the putting of money into the pockets of the Cuſtom Houſe officers. The moſt needful operations of war might be impeded, enterpriſes of great pith and moment might be defeated, if the King, in the exerciſe of this prerogative, was amenable to his own Cuſtom Houſe for the regularity of his forms in the diſtribution of his public ſtores. What is the miſchief ſuggeſted?—that the King might privilege foreign veſſels, contrary to the act of navigation;—a ſuggeſtion as inconſiſtent with the decorum due to the acts of the Crown, as with the conſtitutional view of the prerogatives that belong to it. Though public policy and convenience will neither conſtitute nor overthrow the law, they are good interpreters of that which is doubtful; becauſe it is not to be preſumed that the ſtatute was either blind to public conſequences, or indifferent about them,—that it either did not ſee the inconvenience, or meant to impoſe it. That individuals may avail themſelves frauduently of this royal exemption, is ſaid to be poſſible. Such frauds, when they ſhall occur, may be met by the vigilance of the Court. When private ſtores have been embarked in public tranſports, confiſcation has followed. The whole reſult is, to found on the part of the public a demand of increaſed vigilance in the Court which has to examine the tranſaction.

I cannot,

The SWIFT.

November 26th, 1813.

I cannot, therefore, concur in the view which the learned Judge of the Court below has taken of this caſe. I am compelled, by the view which I have taken of it, on all the conſideration I have given it, to pronounce that the ſtores are not liable to confiſcation. On a queſtion of this extent, it might be adviſeable to reſort to higher opinions, unleſs the circumſtance of its being the laſt caſe of this preciſe nature that can poſſibly occur (*vide* ſtatute 52 *G.* 3. c. 100.) ſhould be thought to render ſuch a reſort leſs neceſſary.

The only queſtion remaining is, that of the ſhip which conveyed this cargo; and it appears to me to be involved entirely in the legal fate and fortune of the cargo. If there be no offence in this cargo, then has this veſſel been guilty of no offence in importing it. The act as to its legal nature is one and indiviſible: and if it is for the advantage of the public that the cargo ſhould be imported, it is not ſtating the caſe of this veſſel too highly to ſay, that it has been unoffending in the importation.

November 26th, 1813.

UNION, OLMSTED.

Ships ſeen to be in chace of the prize during the day, and continuing the purſuit in a proper direction after night comes on, are entitled to ſhare as joint-captors although they are prevented ſeeing the act of capture by the darkneſs of the night.

THIS was the caſe of an *American* veſſel, laden with a very valuable cargo of cotton, and captured on the eighteenth of *January* 1813, whilſt in the proſecution of a voyage from *Philadelphia* to *Bourdeaux*, by His Majeſty's frigate *Iris*. Claims of joint-capture were interpoſed by H. M. S. *Andromaché*, *Rota*, and *Rover*, under the circumſtances detailed in an allegation, which is cited at length in the judgment, and which it is therefore unneceſſary here to ſtate.

The claim of the joint-captors reſted principally on this ground:—That the ſhips were in chaſe, and diſtinctly ſeen, both by the actual captor and by the prize, during the whole of the day previous to the capture; that they continued the chace during the night, and were prevented ſeeing the act of capture ſolely by the darkneſs of the night.

JUDGMENT.

This is a caſe of aſſerted joint-capture on the part of the *Andromache*, *Rota*, and *Rover*, to ſhare in a prize taken by H. M. S. *Iris*. The allegation pleading the fact of joint-capture was admitted without oppoſition at the time; but it is in effect now oppoſed; for the caſe has been argued for the actual captor on two grounds: Firſt, that the facts pleaded in the allegation, if proved, would not entitle them to ſhare; and ſecondly, that the facts are not proved as laid. It will be proper, therefore, to conſider the caſe firſt on the allegation.

The allegation pleads, "That on the 18th of *Ja-*
"*nuary* laſt, H. M. S. *Andromache*, *George Tobin* Eſq.
"commander,

" commander, was on a cruize in the *Bay of Biſcay*, " in company with H. M. S. *Rota*, *Philip Somerville* " Eſq. commander, and ſloop *Rover*, *Juſtice Finley* " Eſq. commander; that, at about nine o'clock of " the ſaid morning, the ſaid ſhip *Andromache* being " in latitude 45.28 N. and longtitude 4. 34 W. and " the *Cordovan* light-houſe bearing N. 87. 45. E. diſ- " tant about 150 miles, and being engaged in ſupply- " ing the *Rota* with proviſions, two ſtrange ſails were " diſcovered from the maſt-head of the *Andromache*, in " the S. E. quarter; whereupon the boats of the ſaid " ſhip were immediately hoiſted in, and all ſail made " in chace of the ſame: That, a ſhort time afterwards, " the ſaid ſtrange ſails were made out to be a mer- " chant veſſel and a frigate in chace of her, the ſaid " merchant veſſel ſteering N. E. by N.; that the *An-* " *dromache*, as alſo the *Rota* and *Rover*, which had " joined in the chace, approached the ſaid merchant " veſſel, ſaw her plainly, and ſoon perceived her to alter " her courſe more to the eaſtward, at which time the " *Andromache* was ſeen from the ſaid prize: That, at " about noon, the ſaid frigate exchanged private ſignals " with the *Andromache* and *Rota*, whereby they all " became known to each other, and the ſaid frigate " was found to be the *Iris*." So that, according to this ſtatement, no doubt can be thrown on the iden- tity of the ſhips. " That the wind being from the weſt- " ward, and the chace to the eaſtward, the *Andro-* " *mache* kept the wind on her larboard ſide, which " enabled her to near the chace, and to prevent her " from getting to windward of the *Iris*; that the *An-* " *dromache* continued the purſuit, though occaſionally " loſing ſight of the chace, as well as of the *Iris*, in " the haze which came on: That, at about five " o'clock,

The UNION.

November 26th, 1813.

" o'clock, they were both clearly ſeen from the *An-*
" *dromache*, bearing N. E. by N. and diſtant about
" four miles, and ſhe was then cloſing very faſt with
" both the ſaid ſhips: That ſhortly after the weather
" becoming very foggy, and darkneſs coming on,
" they were entirely loſt ſight of; but the *Andromache*
" perſiſted in the purſuit, and ſailed to the N. E. with
" a view of intercepting the ſaid chace; and, at
" about half-paſt five, or a quarter before ſix, the
" flaſh of a gun was plainly ſeen, and the report
" thereof diſtinctly heard on board the *Andromache*,
" in the direction of the ſaid chace, which the party
" proponent doth expreſsly allege and propound was
" fired from the *Iris* at the chace, to bring her to;
" and the ſaid gun brought her to accordingly; and
" ſh ewas immediately afterwards captured by the ſaid
" frigate *Iris*, at the diſtance of not more than three
" miles from the *Andromache*; and that the *Andro-*
" *mache* was prevented from being ſeen by the perſons
" on board the prize at the time of capture aforeſaid,
" as well as by thoſe on board the ſaid frigate *Iris*,
" by the fog and darkneſs of the night only." And, I am clearly of opinion that, upon this ſtatement, the ſhips would be entitled to ſhare as joint-captors; becauſe, if they were prevented ſeeing ſolely by the fog and darkneſs of the night, that circumſtance would not be ſufficient to bar them of a right to which they would otherwiſe have been entitled. It is certainly true, that darkneſs preventing ſight will not univerſally exclude from a right to ſhare, nor can the rule be laid down univerſally the other way; for there may not, in every caſe, be evidence to ſhew proximity to the ſcene of action. But where it can be ſhewn that the aſſerted joint-captor was in ſight when the dark-

neſs

neſs came on, that it continued ſteering the ſame courſe by which it was before nearing the prize, and that the prize itſelf alſo continued the ſame courſe, it amounts almoſt to demonſtration that the ſhips would have ſeen and been ſeen by each other, if darkneſs had not intervened. Upon the allegation, therefore, the caſe appears to be quite clear; and I am of opinion that any oppoſition to its admiſſion would have been perfectly vain.

And this brings me to the other part of the caſe, namely, how far the allegation is ſupported by the evidence. Now the evidence is all on one ſide; for the actual captor has not oppoſed any contradiction to the account given by the witneſſes for the joint-captor. It has, however, been ſaid, and truly ſaid, that the joint-captor muſt make out his caſe; that the *onus probandi* lies upon him; that the actual captor's caſe may be ſufficiently ſuſtained by ſhewing the joint-captor's evidence to be defective: and, theſe poſitions being admitted as indiſputable, it is then contended that the evidence here falls ſubſtantially ſhort of that ſtatement of facts contained in the allegation, on which I ſignified an opinion that the law would eſtabliſh the intereſts of a joint-captor.

The witneſſes in preparatory ſay, there was no other ſhip in ſight *at the time of capture*; but their evidence upon this point is very immaterial, becauſe it is an admitted fact that the ſhips were not in actual ſight at that criſis; their depoſition, therefore, to this effect furniſhes not the ſlighteſt contradiction to the claim of the joint-captor. The ſame perſons have been again examined upon the allegation, together with ſome releaſing witneſſes from on board the *Andromache*. Theſe laſt are of courſe ſubject to the common ſuſpicions to which

The UNION.

November 26th, 1813.

" o'clock, they were both clearly
" *dromache*, bearing N. E. by N
" four miles, and ſhe was ther
" both the ſaid ſhips: That
" becoming very foggy,
" they were entirely loſt
" perſiſted in the purſ
" a view of interce
" about half-paſt
" flaſh of a gu
" thereof diſti
" in the dire
" propone
" fired
" and
" ſh
" ſ
" ged private ſignals with the *Andromache* and

it
a-
h
'o
re
ſi-
if
in
nt proof
ele two ſhips
ele three the evening
t be admitted, that there
nct proof which the allegation
at aſſerts their mutual knowledge
er. It is pleaded " that the frigate ex-

Rota, whereby they all became known to each other; " and the ſaid frigate was found to be the *Iris*." Now this is not fully ſupported by the evidence; for the witneſſes do not ſpeak to the particular knowledge of the ſhips of each other, only that " they recognized " each other as friends." It is left, therefore, very looſely (comparatively at leaſt) whether they poſſeſſed this particular mutual knowledge of each other, which the allegation poſitively aſſerts. But the queſtion is, whether, taking it ſo, there is not ſtill a ſatisfactory proof,—and I am clearly of opinion that there is. It is proved that two ſhips were ſeen at ſuch a time, in ſuch a quarter, and with ſuch movements as belonged to theſe two; and it is alſo proved by the witneſſes on board the prize, that three ſhips were ſeen at ſuch a time, in ſuch a quarter, and with ſuch movements as belonged to theſe three. Now that all theſe circumſtances

ſtances ſhould coincide with the circumſtances that belonged to five other veſſels, is a moſt groſs improbability; and the improbability is increaſed by the fact that no other veſſels are in any manner indicated to which ſuch circumſtances belonged, either by any claim of their own, or by any aſſertion on the part of the actual captor. If other ſhips had not only actually ſeen, but actually chaſed, during the whole courſe of the day, had approached the prize in the decline of the day, and had only been prevented from ſeeing the ſequel by the night and fog ſupervening, it is quite impoſſible that their claim ſhould not have been interpoſed on the ſame grounds that have invited the claims of theſe veſſels. That ſuch veſſels ſhould concern themſelves no further, ſhould deſiſt from enquiry, and ſhould not avail themſelves of the intelligence they might obtain; and that there ſhould be found three other ſhips, who, without knowing the circumſtances, ſhould be able to ſtate all the circumſtances accurately, in order to conſtruct a falſe claim, is beyond the reach of the wildeſt poetical fiction. I have no doubt, therefore, in ſaying that there is ſufficient proof of identity as to the *Rota*.

The next defect which has been attempted to be pointed out is, that the *Andromache* did not purſue the right courſe, but went conjecturally, and in ſearch, and, like the *Niemen*, (*vide* page 9,) in a courſe that would never have brought her up to the prize. That ſhip certainly had the *animus perſequendi*, but unfortunately directed in a courſe that was the very reverſe of a chace. But here the evidence eſtabliſhes a caſe directly the contrary; for it entirely ſupports the allegation, which aſſerts that the ſhips had two objects in view, in ſteering their courſe as they did,—to come up with

The UNION.

November 26th, 1813.

with the prize, and to prevent her going in a courſe by which ſhe might avoid the *Iris*. The two objects were perfectly conſiſtent. The objection ſuppoſes, that the courſe which ſhe ſteered, though it might ſerve the one purpoſe of intercepting, if neceſſary, would defeat the other more direct and material one, of coming up with the prize. But the fact anſwers the objection; for all the witneſſes depoſe that ſhe perſiſted in the purſuit: That the flaſh of the gun was diſtinctly ſeen, and the report heard in the direction of the chace, the *Andromache* being, at the time, not more that three or four miles off, and clearly within viſible diſtance, but for the intervention of the fog and darkneſs, and continuing in the ſame direction after ſhe had ſeen the fire, as before. She did not come up, becauſe the firing ceaſed on the capture of the veſſel, and the courſe of the veſſel ceaſed on the ſame occaſion; and the darkneſs and fog, and ſqually bluſtering weather continued, in which ſhe muſt have paſſed them. Having before ſtated my opinion that the allegation, if ſupported, would eſtabliſh the claim, and being of opinion that ſufficient proof has been adduced, I ſhall pronounce for the intereſt of the *Andromache*; and, as I ſee no material difference in the caſes of the other ſhips, I ſhall pronounce them alſo to be entitled to ſhare.

It has been objected that no releaſing witneſſes have been examined on the part of the *Rover*, in order to prove that ſhe perſiſted in the chace; but I am of opinion that this defect is compenſated by the circumſtance of her coming up on the next morning, and putting in her claim.

BELVIDERE, MARSH. *July* 6th, 1813.

The claim of *British* merchants for advances made by them for the uſe of an *American* ſhip ſeized by the Government upon the breaking out hoſtilities with that country, cannot be allowed upon the mere averment of the parties themſelves that the ſhip was put into their hands as a ſecurity for the debt ſo contracted; and the caſe is ſtill more unfavourable if the money was advanced not for the immediate outfit of the veſſel, but for the general mercantile tranſactions of the *American* owners.

THIS was an application on behalf of Meſſrs. *Sanſom* and Co., *Britiſh* merchants, to obtain poſſeſſion of an *American* ſhip, which was ſeized in the River *Thames*, under the embargo which preceded the declaration of hoſtilities between *Great Britain* and the United States of *America*.

It was ſtated in an affidavit made by one of the partners in the houſe of *Sanſom* and Co., that they had advanced conſiderable ſums to the *American* owners on account of this ſhip; and that it was put into their poſſeſſion as a ſecurity for the repayment of the money advanced by their houſe of trade: That they ſent the ſhip, under the protection of a licence, bearing date the 14th of *Auguſt* 1811, to the *Baltic* and back; and that the amount of freight earned on the voyage was placed to the credit of the ſhip: That they obtained another licence in *February* 1812, for a ſimilar voyage, but made no uſe of it; becauſe it would have been neceſſary to have advanced money for the purchaſe of a cargo, which they declined to do, in conſequence of the non-arrival of ſome remittances which they had expected from their *American* correſpondents. It was ſtated, likewiſe, in the affidavit, that by way of further ſecurity, a power of attorney was executed on the 7th of *March* 1812, authoriſing *Sanſom* and Co. to ſell the ſhip, or to employ her in any way that they might deem moſt eligible for their intereſt. A letter of attorney to this effect was annexed to the affidavit; and there was alſo exhibited an account-current between the parties reſpecting the ſhip; from which it appeared that

The BELVIDERE.

July 6th, 1813.

that the balance due to Meſſrs. *Sanſom* and Co. from the *American* owners, on the 31ſt of *December* 1812, amounted to £1,724. 4s. 9d. The affidavit alſo ſtated, that the *American* houſe of trade were further indebted to Meſſrs. *Sanſom* and Co. in the ſum of £3,257. 17s. for which they had no ſecurity whatever.

For the Crown, the King's Advocate and *Adams* contended, That the Court was not at liberty in prize proceedings to attend to collateral claims; and that the legal title being in the *American* owners, the ſhip muſt neceſſarily by condemned as enemy's property. That nothing but an order * from the Crown, directing the re-payment of the advances made by the *Britiſh* merchants, could juſtify the Court in pronouncing for the claim which had been made on their behalf. That Meſſrs. *Sanſom* and Co. had no lien on this ſhip, at leaſt nothing that could be ſo conſidered, according to the law of *England*. That the power of attorney, which had been produced, did not contain any aſſignment of the ſhip to them by way of ſecurity for the

* On the breaking out of hoſtilities with *Denmark*, in the year 1807, an order in council, of which the following is an extract, was iſſued: "And it is hereby further ordered, that in caſe any "advances ſhall have been made before the late embargo, viz. the "ſecond of *September* laſt, by any *Britiſh* ſubject upon the credit "and ſecurity of any ſhip, freight, or goods belonging to "*Daniſh* ſubjects, which may be condemned as prize to His Ma"jeſty, the amount of ſuch advances ſo actually made (but with"out farther compenſation) ſhall be paid to the ſaid *Britiſh* "ſubjects, out of the proceeds of the property ſo condemned, "upon the credit of which the advances were reſpectively made, "upon due proof thereof to the ſatisfaction of the High Court "of Admiralty, &c."

debt,

debt, but merely authorized them to ſell the veſſel, or to employ her till a ſale ſhould be effected. That the Court, by decreeing poſſeſſion of this ſhip to Meſſrs. *Sanſom* and Co. would in effect decree that the Crown ſhould pay the debts of its enemies, ſince the debt of the *American* owners to the *Britiſh* merchants would, by the delivery of the ſhip into their poſſeſſion, be *pro tanto* extinguiſhed. That part of the money had been advanced by Meſſrs. *Sanſom* and Co. ſince the embargo was impoſed, and for this they could have nothing in the nature of a lien on the ſhip. That the parties having failed in eſtabliſhing either a legal or equitable title to the ſhip, their prayer muſt be rejected.

For the Claimants it was contended, That although the Crown is under no obligation to allow claims which are latent only, and which cannot be enforced without the aid of a court of juſtice; yet it is bound to reſpect the claims of its ſubjects upon property placed in their hands as a ſecurity for money advanced by them. That ſimilar claims had been allowed by the Crown on former occaſions. *Tobago, DeWit*, 5 *Rob.* 218. *Conſtantia, Harleſſen*, (*Edwards's Rep.* 232.) *Vrow Sarah, Claſſina.**

JUDGMENT.

---

* This was the caſe of a *Dutch* ſhip, which ſailed in *July* 1802, on a voyage from the *Texel* to *Surinam*, but put into *Cowes* in diſtreſs, in conſequence of damage ſhe had ſuſtained at ſea. On his arrival at *Cowes*, the maſter applied for aſſiſtance to Meſſrs. *Day*, of that place, who, after a regular ſurvey, cauſed the cargo to be unlivered and warehouſed, and put the veſſel into the hands of Meſſrs. *Sieur* and *Mitchell*, with directions to them to make the neceſſary repairs, which they accordingly did. After the repairs had been completed, the ſhip and cargo were ſeized, under the embargo (15 *May* 1803), which preceded the declaration of hoſ-

The Belvidere.

July 6th, 1813.

JUDGMENT.

Sir *W. Scott.*—This is the caſe of an *American* veſſel, which has been ſeized in the *London Dock*, and is liable to condemnation as the property of an enemy to the Crown of this country. No regular claim has been given for the ſhip; but an application is made to the Court by merchants in this town (Meſſrs. *Sanſom* and Co.) to have the ſhip re-delivered to them, ſtating that it had been placed in their hands as a ſecurity for money advanced by them on account of this very ſhip. Caſes have been ſtated in which the Court has certainly attended to claims ſomewhat ſimilar; but in all thoſe caſes the parties had ſome certain evidence of their right: They had either a poſitive lien upon the ſhip, or were in poſſeſſion of a bottomree-bond, or ſome ſpecific ſecurity. In this caſe, nothing of the kind is made out by the claimants; and this does, I think, materially diſtinguiſh it from thoſe caſes which have been mentioned. Here is nothing but an affidavit of the claimants themſelves, ſtating that they have, at various times, advanced money for the uſes of this ſhip, and that the *American* owners had put them in poſſeſſion of it as a ſecurity for the debt ſo contracted. No bottomree-bond or any inſtrument of any kind is produced in ſupport of the claim, which is left to reſt upon the mere averment of the parties intereſted. The

---

tilities againſt the *Batavian* republic, and were proceeded againſt as droits of Admiralty. A claim was given by Meſſrs. *Sieur* and *Mitchell*, for the amount of the repairs done by them, and alſo on behalf of Meſſrs. *Day*, for the money they had advanced for the unlivering and warehouſing the cargo, and other incidental expences. The Court pronounced in favour of the claims, referring it to the regiſtrar and merchants to aſcertain the ſums actually due to the claimants.

perſons

The BELVIDERE.

July 6th, 1813.

persons who have made this affidavit are certainly of the highest respectability in the class of persons to which they belong; but the Court cannot take a fact of this sort upon the bare averment of any persons, however respectable, or suffer itself to make personal distinctions in matters of this kind. It expects to be furnished with something more substantial than the mere affidavit of the parties themselves. Nothing more is offered in the present case; and this defect is, I think, fatal to the claim.

What Mr. *Sanson* swears is this: That the vessel was put into the possession of the house of trade to which he belongs, as a security for money advanced by them; but this statement is wholly unsupported by documentary evidence, and rests on the assertion of Mr. *Sanson* himself. What sort of possession of the ship was given to this gentleman? According to his own statement, it was entrusted to him partly for the sale of the ship, and partly for its employment in trade. But that any instrument to this effect was executed, or that there was any correspondence by letter relative to this business, does not at all appear. Thus far the matter rests upon mere verbal agreement, between the parties, —if indeed there was any thing that can be treated as an actual agreement upon the subject. Then (at a very late date) comes a general power of attorney; such as might be very well granted to any other agent, who had no claims whatever on the ship. The accounts too are made out in the way in which any other agent must be supposed to make out his accounts; for the profits earned by this ship in the way of freight are placed to the account of the principal in *America*. There is so manifest a deficiency in the evidence, that it is impossible for the Court to sustain the demand.

The BELVIDERE.

July 6th, 1813.

Another very important conſideration in the preſent caſe is, that the advances, which are ſtated to have been made, were not merely for the purpoſe of covering expences incurred in the repairs and outfit of this veſſel, but for the general mercantile tranſactions of the *American* owner. The Court has never gone the length of allowing a claim ſo founded. What was done in the caſe of the *Vrow Sarah*, *Claſſina*, and the other caſes which have been mentioned, was to give *Engliſh* merchants, from the bounty of the Crown, the expences incurred in the outfit of the veſſel immediately before the ſeizure was made. It was thought by the Court, and by the Government alſo, that it would be a harſh meaſure to make *Britiſh* merchants ſuſtain the loſs of money ſo expended. But here the Court is called upon to inveſtigate tranſactions which have no ſubſtantive affinity to the preſent, and to examine accounts of profit and loſs upon a courſe of trade which was going on for a number of years. I am clearly of opinion that it is not within the province of this Court to enter upon ſuch an inveſtigation. There may exiſt counter-demands on the part of the *American* owners: there may be diſputed accounts between them and *Sanſom*'s houſe of trade, to which the Court can have no acceſs. Differences may exiſt as to the employment or non-employment of this veſſel. The owner may perhaps ſay that the ſhip was not employed according to his order. I think I ſhould depart from all conſiſtency of judgment, if I were to allow a claim like the preſent, which differs ſubſtantially from thoſe to which it has been repreſented as ſimilar, which is latent, ancient in point of time, and unaccompanied by any ſatisfactory proof. If I were to take this ſhip out of the poſſeſſion of the ſeizor, I muſt probably be under the neceſſity of doing the

the ſame with every other ſhip which has been ſeized in the ſame way; for I ſuppoſe there is hardly any *American* ſhip in this country for which advances have not been made in a ſimilar manner. Every agent to whom an *American* ſhip has been conſigned for employment in *European* trade, has the ſame kind of poſſeſſion; and many of them have doubtleſs orders to ſell the ſhip, if no advantageous employment can be procured. All that Mr. *Sanſom* ſtates in his affidavit, points rather to the direction and management of the ſhip, for the benefit of the *American* owner, than to any poſſeſſion by way of ſecurity to himſelf. I am, under the neceſſity of rejecting the claim.

The BEDVIDERE. *July* 6th, 1813.

SPARKLER, BROWN. *December* 24, 1813.

THIS was a claim on behalf of His Majeſty's ſhip *Armide*, to ſhare in the ſalvage which had been decreed to the *Nimrod*, for the recapture of this *Britiſh* ſhip and cargo from the hands of the enemy. The claim was founded on the fact of ſight and of joint-chaſing. There was alſo a queſtion of coſts, ariſing upon the miſconduct of the *Nimrod*, from which ſhip falſe information had been given reſpecting the prize, and had occaſioned a neceſſity for the expences attending this litigation.

A ſhip in ſight at the time of capture is entitled to ſhare in the prize from that circumſtance alone, and the claim is ſtill ſtronger in favour of a ſhip which has joined in the purſuit of the prize.

JUDGMENT.

Sir *W. Scott*.—This caſe, which is one of aſſerted joint-capture, has been deſcribed in the argument as an extreme caſe; but I own that it does not appear to

The
SPARKLER.

December 2d, 1813.

me to anſwer that deſcription. The rule of law upon this ſubject is, that a ſhip in ſight at the time of capture is entitled to ſhare in the prize from that circumſtance alone, unleſs the caſe happens to fall within one of the exceptions to that general rule; ſuch as the circumſtance of ſteering a directly contrary courſe; for that might defeat an intereſt which would otherwiſe have been ſupported upon the ground of being in ſight. It may ſeem hard upon the actual captor, that a veſſel, which was perhaps ſcarcely in ſight, and contributed nothing to the capture, ſhould be entitled to an equal ſhare of the benefit with another ſhip, which may perhaps have been engaged in a long purſuit of the prize, and may likewiſe have ſuſtained a very ſevere conflict. Where exertions of this kind have been made by the actual captor, and no aſſiſtance has been afforded by the veſſel claiming to ſhare as joint-captor, the caſe may very properly be called an extreme one; but, according to the ſtatement contained in the allegation, there was in this caſe an actual contribution of aſſiſtance on the part of the *Armide*, for that ſhip is aſſerted to have joined in the purſuit with the *Nimrod*. Such a claim is not to be deſcribed as an extreme one, or as one which the Court would ſtrain hard to reject. It is rather entitled to be conſidered in a favourable point of view; for the law is willing to favour the intereſts of all who contribute their endeavours to capture the veſſels of the enemy.

Upon the facts of the caſe, I can entertain no doubt. The fact that the *Armide* ſaw the prize, and was alſo ſeen from the prize, is indiſputably proved. It is proved, likewiſe, that ſhe was ſteering in a direction towards the prize; nor is it a ſufficient contradiction to this to ſay, that ſhe ſteered a courſe different to that of

The SPARKLER.

December 2d, 1813.

of the *Nimrod*; for it is not neceſſary that the joint-captor ſhould purſue the prize in exactly the ſame courſe with the actual captor: indeed the ſituation and bearing of the ſhips to the prize and to each other, may frequently make it proper that they ſhould ſhape their courſes in directions not preciſely the ſame. The fact, as I before obſerved, is eſtabliſhed, that the *Armide* ſteered in purſuit of the prize, and that ſhe was ſeen by the prize ſo to do; and though the ſight was now and then obſcured, yet the purſuit was continued up to the time of capture, and even after it had taken place. With reſpect to the identity of the three ſhips, there can be no doubt; for it is next to an impoſſibility that the very ſame circumſtances ſhould have occurred to three other veſſels preciſely at the ſame time. According to the reaſoning of the Court in other caſes, I muſt hold the fact of identity to be ſatisfactorily eſtabliſhed by the coincidence of ſeveral circumſtances.

Actual captor giving falſe information reſpecting the prize, is liable to be viſited with coſts.

I proceed, in the next place, to conſider the queſtion of coſts. Now it is evident that there has been ſuch a degree of miſconduct on the part of the actual captor, that would juſtify the Court, if it was diſpoſed to act rigorouſly, in viſiting him with coſts. It is a painful thing in any caſe to ſee that in the ſworn anſwers leſs attention is paid to the ſanctity of an oath than is due upon all occaſions to ſo ſerious an obligation. After the prize had been boarded by the *Nimrod*, it appears that a lieutenant and midſhipman were ſent off to that ſhip from the *Armide*, with directions to make enquiry reſpecting the name and other particulars of the veſſel, which had been boarded; and that, upon their arrival on board the *Nimrod*, they were aſſured that no prize had been made, but that a tranſaction of a totally

The SPARKLER.

December 2d, 1813.

a totally different nature had taken place:—That the veſſel which they had been purſuing, was found to be protected by a licence, and had on that account been diſmiſſed. In conſequence of the repreſentation ſo made, and to which full credit was then given, the claim of the *Armide* was for a time abandoned, and it was from mere accident that the truth was afterwards diſcovered. The excuſe which has been ſet up by the perſon who returned the anſwer, that he returned a *falſe* anſwer, becauſe the queſtion was not put to him by the proper perſon, is unſatisfactory. Want of authority in the perſon putting the queſtion might at the utmoſt be a reaſon for declining to anſwer altogether, but can never juſtify an attempt to miſlead, by returning an anſwer altogether falſe. According to the real demerits in this conduct, I ſhould feel myſelf juſtified in condemning the party in the coſts of this litigation; but it muſt at the ſame time be recollected, that he is the actual captor, and that, from the ſize of the *Armide*, for whoſe intereſt I have pronounced, the ſhare of the *Nimrod* will be very much diminiſhed. It would be hard too to take away any of the rights of other officers and men, who are not implicated in this act of miſconduct. I ſhall, therefore, content myſelf with pronouncing for the claim of the *Armide*, and directing the expences of the two commiſſions, for the examination of witneſſes, to be deducted from the ſhare of the *Nimrod*.

The counſel for the commander of the *Nimrod* having repreſented that the expence would exceed his ſhare of the prize, which muſt be reduced very low by his own expences, and by the magnitude of the

ſhare

ſhare to which the *Armide* would be entitled, in conſequence of the ſize of that ſhip, the Court directed the parties reſpectively to pay their own expences; but expreſſed a wiſh that this ſhould be underſtood as not withdrawing its diſapprobation of the conduct of the officer of the *Nimrod*.

JOHN, TURNER.

December 2d, 1813.

THIS was a claim on behalf of the commanding officers and crew of His Majeſty's ſloop *Royaliſt*, to ſhare in the ſalvage due for the re-capture of this *Britiſh* ſhip and cargo, which had been taken by the enemy, and re-taken by H. M. S. *Bermuda*. The circumſtances of the caſe are fully ſtated in the judgment of the Court.

The burden of proof lies upon the party ſetting up a claim of joint capture, and the teſtimony of releaſing witneſſes if unſupported by other evidence is inſufficient to eſtabliſh ſuch a claim.

JUDGMENT.

Sir *W. Scott*.—It is hardly neceſſary for me to repeat the obſervation which the Court has in very many caſes occaſion to make, that the actual captor is the favourite of the law, and that the Court will not ſuffer his intereſt to be affected but by evidence the moſt ſatisfactory. The *onus probandi* lies upon the party ſetting up a claim as joint-captor, who, in order to eſtabliſh it, muſt bring very clear proof in ſupport of his caſe. The evidence of releaſing witneſſes, if unſupported by other teſtimony, has always been held inſufficient for ſuch a purpoſe. An allegation has been given in this caſe in which it is pleaded, "that, on the "2d of *November* 1811, the perſons on board the "*Royaliſt* obſerved a brig under the land on the

"weather-

The John.

December 2d. 1813.

" weather-bow, and ſoon diſcovered the ſame to be His " Majeſty's ſhip the *Bermuda* ; and ſhortly afterwards " they obſerved another brig nearer to the land, and " to the eaſtward of *St. Valery*, which then bore from " them ſouth-weſt about ten or eleven miles; that " they immediately afterwards ſaw the *Bermuda* under " ſail, working to windward, in chaſe of the ſaid brig ; " and they obſerved her to ſhorten ſail and heave to, " and the ſaid brig bear up ; and at ſuch time, being " about 7 A. M. of the ſaid day, the *Bermuda* boarded " and re-captured the ſaid brig." Really one would ſuppoſe, from this repreſentation, that the *Bermuda* herſelf boarded the prize; whereas, in point of fact, it turns out that the boarding took place from the boat (or gig as it is called) of the *Bermuda*, which was at ſome diſtance from the ſhip, and that ſhe herſelf did not come up till half an hour afterwards. The releaſing witneſſes, who have been examined, though individually they may be perſons of very great credit, are ſtill ſubject to the obſervation which has been before made regarding all witneſſes of the ſame deſcription, that a claim cannot be eſtabliſhed upon their evidence only. That no other witneſſes have been examined, is the fault of the aſſerted joint-captor, whoſe intereſt required him to produce them, if he had it in his power ſo to do. The only evidence with which the Court has been furniſhed, in addition to that of the releaſing witneſſes, is contained in the anſwers of Captain *Cunningham*, the actual captor; and I think it extraordinary that the caſe ſhould have been left here. Captain *Cunningham* ſtates, in his anſwer, "that his gig " came up about ſeven o'clock with the ſaid veſſel, when " the ſaid officer and men boarded and re-captured her, " when ſhe proved to be the brig *John* ; but he denies " and

The JOHN.

December 2d, 1813.

" and diſbelieves that at ſuch time His Majeſty's ſloop " *Royaliſt* was in ſight thereof, or capable of aiding " and aſſiſting therein, if it had been neceſſary, or that " the *Royaliſt* was ſeen by the perſons on board the " ſaid brig; for he ſays that, when he ſaw the ſaid " brig *John* coming out before the wind in the poſſeſ- " ſion of his boat's crew, he ſent a midſhipman to the " maſt-head of the *Bermuda*, to diſcover whether " there was any veſſel in ſight, who reported that there " was none, and which he verily believes to be true. " He further ſays, that, about half an hour after, the " *John* was captured by the *Bermuda*, which had hove- " to, and another boat was ſent on board for the maſ- " ter of the ſaid brig, who returned with him, and the " brig was then taken in tow by the *Bermuda*; and that " when the *Bermuda* tacked a few minutes previous to " her ſo heaving to, the *Royaliſt* was firſt ſeen directly to " leeward from 12 to 15 miles diſtant; and that about " 10 o'clock the ſame day, the *Bermuda* paſſed within " hail of the *Royaliſt*." So far, therefore, the anſwer of Captain *Cunningham* contains a direct negative of the claim which has been ſet up. Captain *Downie*, he ſays, aſked him, "where the ſaid brig which he had " in tow was from, and how laden; to which he re- " plied, *laden with wine*; and that Captain *Downie* " then ſaid, *We ſaw you*." It is a pity this was not put in a more clear and pointed manner by Captain *Downie*, if he had any intention of aſſerting the right of the *Royaliſt* to ſhare in the capture. One of the witneſſes, indeed, ſwears, that Captain *Downie* ſaid, " *We ſaw you take her*;" but in this he is not ſup- ported by the other perſons who have been examined on the plea, and his teſtimony, therefore, is not to be much regarded. The reply of Captain *Cunningham* leaves

The JOHN.

December 2d, 1813.

leaves the matter equally at large, "*We ſaw you, too,*" but not ſpecifying at what particular time. One would naturally ſuppoſe, that this converſation referred to the time of capture; but it is by no means certain that it is ſo; and Captain *Cunningham* ſwears that he had no ſuch meaning, but that "he meant *at the time before* "*ſtated in his anſwer,*" and not at the time when the recapture was effected. It has been contended in argument, and the principle has not been denied, that if there is any ambiguity in the caſe, it is ſufficient to put an end to the claim of the aſſerted joint captors. Their caſe reſts entirely upon the evidence of the releaſing witneſſes, which is not reſting upon a rock; and the party has thrown away or loſt the opportunity of examining other witneſſes. As Captain *Cunningham*, in his anſwer, does not ſupport, but denies, that he meant what ſhould be more naturally underſtood from the terms of his anſwer, the Court is bound to apply that interpretation. The caſe, then, reſts on the evidence of releaſing witneſſes only, which is not ſufficient; and I am, therefore, under the neceſſity of pronouncing againſt the claim of the *Royaliſt*.

MATILDA, RANTIN.

December 16th, 1813.

THIS was the caſe of an *American* privateer, which was captured on the 27th of *March* laſt, off the Coaſt of *Braſil*, by the *Britiſh* privateer the *Lion*, after a very ſevere action, in which the commander and firſt-lieutenant, with ſeveral of the crew, were killed, and many others wounded. A prize-maſter and ſome men were put on board from the *Lion*, and the veſſel was deſpatched for *England*; but, in the courſe of her voyage, being about eight leagues to the weſtward of *Scilly*, ſhe was retaken, on the 23d of *July*, by the *American* ſloop of war the *Argus*, which, after taking out all thepeople put on board from the *Lion*, but leaving two of the original crew of the *Matilda*, put the maſter's mate and twelve other men from the *Argus* on board, and directed them to navigate the veſſel to the firſt *French* port. On the 25th of *July*, the ſhip was again taken by the *Britiſh* frigate the *Revolutionaire*, and brought to the port of *Plymouth*. The crew of the *Matilda* conſiſted of 81 perſons at the time when ſhe was taken by the *Lion*, 5 of whom were killed in the action, and 24 wounded, who were, with the ſurgeon, put on ſhore, and ſent to the hoſpital at *Pernambuco*; 47 others were landed at *St. Salvador*, in conſequence of an arrangement made between the *Britiſh* conſul at that place and the conſul of the *United States*, who likewiſe gave a receipt for the 24 men, who had been landed at *Pernambuco*. The remaining four, who were officers, were ſuffered to go on parole. The ſhip was condemned as a prize taken by H. M. S. *Revolutionaire*; but the queſtion was, whether

The military character of a veſſel is not ſo loſt by capture and re-capture as to extinguiſh the right to head-money.

The MATILDA.

December 16th, 1813.

whether ſhe had not ſo loſt her military character by capture and re-capture, as to extinguiſh the right to head money.

The Court expreſſed its inclination to go as far as poſſible in ſupport of a claim for head-money under ſuch circumſtances, and accordingly decreed head-money for 15 men to be due to the *Revolutionaire*, and for 80 men to the *Lion*, the prize having been actually brought home notwithſtanding an intermediate hoſtile repoſſeſſion.

January 31ſt, 1814.

EMPRESS, MORAN.

THIS *American* ſhip, laden with a cargo of ſugar, coffee, cotton, and other goods, was captured in the proſecution of her voyage from *New York* to *Bourdeaux*, about midnight, on the 29th of *November* 1812, by His Majeſty's ſloop of war *Rover*, *Francis Erſkine Lock*, Eſq. commander, and brought to *Plymouth*. A claim of joint capture was given on behalf of the commanding officers and crew of His Majeſty's ſhip *Beaver*, under the circumſtances ſtated in the udgment of the Court.

JUDGMENT.

Sir *W. Scott*.—This is a queſtion of joint capture between two of His Majeſty's ſhips, the *Beaver* and the *Rover*, ariſing upon the capture of this *American* ſhip and cargo. The facts of the caſe are preſented to the Court in an allegation given in on behalf of the *Beaver*, the aſſerted joint-captor; to which the anſwers of the actual captor have been taken; and alſo upon the evidence of three releaſing witneſſes. Theſe wit-

The EMPRESS.

January 31st, 1814.

neſſes are of a ſuperior quality to thoſe who are uſually examined in caſes of this kind; but releaſing witneſſes are not at any time favourites of the law, and, except ſo far as they are confirmed by the teſtimony of others, their evidence will go but little way to eſtabliſh the neceſſary facts.

The allegation, in this caſe, was admitted without oppoſition, but that is a circumſtance from which the parties can derive no great advantage: To oppoſe the admiſſion of an allegation, or not, is in all caſes matter of diſcretion. It may, in many inſtances, be advantageous ſo to do, but it ſometimes happens that the caſe of the adverſary is amended by an objection to the admiſſibility of his plea. If there had been any oppoſition in the preſent caſe, the probability is, that the allegation would have been ſo altered as to bring the caſe more fully before the Court, by an accurate ſtatement of the circumſtances.

The allegation ſtates, "that His Majeſty's brig of "war, the *Beagle*, *John Smith* Eſq. commander, "being on a cruize againſt His Majeſty's enemies in "the *Bay of Biſcay*, about eight o'clock in the morn-"ing of *Sunday*, the 29th of *November* laſt, thoſe on "board her diſcovered a ſail to leeward, ſtanding to "the north-eaſt, the wind then being about ſouth and "by weſt, blowing moderately, to which they imme-"diately gave chaſe, and, ſoon after, perceived a brig "ſtill farther to leeward, likewiſe in chaſe of the ſame "object, which appeared to be an *American* attempting "to eſcape into a *French* port; that the ſaid ſecond "veſſel ſo diſcovered was His Majeſty's brig of war "*Rover*, the ſaid *Francis Erſkine Lock* Eſq. commander, "the other party in this cauſe; and that the *Rover* "and *Beagle* recognized each other by interchanging

The EMPRESS.

January 31st, 1814.

" ſignals, and jointly continued the chaſe until about " two o'clock of that day, when the brig was diſ- " covered from on board both veſſels to leeward of the " *Rover*, and apparently a conſort of the firſt diſ- " covered veſſel; and the ſaid *Francis Erſkine Lock* " Eſq. thereupon by ſignal requeſted inſtructions of " the ſaid *John Smith* Eſq. as his ſenior officer, whether " he ſhould diſcontinue the chaſe of the ſaid firſt diſ- " covered veſſel, and go in chaſe of that laſt diſcovered " as aforeſaid, and which the ſaid *John Smith* Eſq. " directed him to do." Now it has been matter of much controverſy, and certainly of much important controverſy, whether the application that was made by Captain *Lock* was *for advice merely, or for orders*, and this part of the caſe might probably have been made clearer, if the admiſſion of the allegation had been oppoſed. The allegation goes on to ſtate " that " the *Rover* thereupon bore up, and went in chaſe of " the ſaid laſt diſcovered ſail, and, about twelve at " night, came up with and captured her, being the " *American* veſſel the *Empreſs*, proceeded againſt " in this cauſe; that His Majeſty's ſaid brig, the " *Beagle*, continued the chaſe of the ſaid firſt diſ- " covered veſſel, in ſight of the *Rover* and the ſaid " laſt diſcovered veſſel, until dark, and during the " night loſt ſight of her and the *Rover*." So that it ſhould appear the *Beagle* did continue the chaſe of the prize till ſix o'clock, when it became dark; and it is not diſputed, that one of the King's ſhips went in purſuit of one of the ſtrange veſſels, and the other of the other.

The queſtion which I have to decide is, whether the *Rover* and the *Beagle* were acting in concert with each other

The EMPRESS.

January 31ſt, 1814.

other under the directions of Captain *Smith*, the ſenior officer; or whether what paſſed between the commanders is to be conſidered a mere conſultation, each veſſel purſuing its own ſeparate intereſts.

Now I muſt ſet off with the preſumption that, upon view of two of the enemy's veſſels, it was the intention of both the commanders that both the enemy's veſſels ſhould, if poſſible, be captured; for it is the duty of the King's ſubjects to uſe their beſt endeavours to deſtroy the commerce of the enemy; and, I am bound to preſume, that His Majeſty's officers are at all times willing to do their duty. Where both the parties are totally independant of each other, if, indeed, ſuch a caſe can exiſt, then they muſt act according to the beſt of their reſpective judgments. But, if one is ſubordinate to the other, (and it can ſcarcely happen otherwiſe,) it becomes the duty of the inferior officer to obey the directions of his ſuperior. By the rules of the navy, it appears that a junior officer, upon coming in ſight of a ſenior, immediately becomes ſubject to his command, and muſt obey him without any previous order from the Admiralty to that effect; and it can make no difference whether the orders of the ſuperior officer are expreſſed in civil or in peremptory terms. From the the anſwers of Captain *Lock*, it appears that the commander of the *Rover* originally propoſed to follow the firſt diſcovered veſſel, for he applied in the firſt inſtance, to know whether he ſhould not follow that, although it appears, from the ſequel, that he purſued the other veſſel, in purſuance of the direction of his ſuperior officer. It is clear that Captain *Lock* applied to Captain *Smith* as to *his ſenior officer*, and this not merely as to a perſon of greater experience, but as to a perſon clothed with an authority which he was bound to obey. The anſwer

The IMPRESS.

January 31st, 1814.

which is given by Captain *Smith* is undoubtedly civil in its terms, but it prescribes a course of duty, and cannot but be considered as equivalent to a command. "I think you *had better* go after the other." We speak so, sometimes, to a servant, meaning, however at the same time, to command him to do the thing which we desire to have done. It is quite clear, in this instance, that Captain *Lock* understood the answer of Captain *Smith as a command*; for he immediately conforms to his directions, though contrary to his own opinion; and, in consequence of this conformity, the capture was ultimately effected by him; the *Beagle*, in the mean time, continuing to chase the other vessel, under the hope that the capture of both might have been effected. The two ships had associated for the purpose of making the capture of both vessels, and the capture of one of them, the prize in question, was made by the *Raven*, in consequence of directions given by the senior officer commanding the *Beagle*, and a distribution of the force pursuant to those directions. I consider it to be a clear rule of law, that ships engaged in a joint enterprize of this kind, and acting under the orders of the same superior officer, are entitled to share in each others prizes; and it is certainly for the benefit of the public service that a rule of this sort should prevail, in order that the public force of the state may be distributed so as to produce the greatest possible advantage to the country, and the greatest possible annoyance to the enemy. I am of opinion, therefore, that the *Beagle* is entitled to share in the prize.

FRIENDSHIP, Cox.

February 11th, 1814.

If the claimant distinctly apprehended the ground of proceeding, as well as of seizure, this Court will not permit him to take advantage of informalities in the proceedings before the Court of Vice-Admiralty from which the case is appealed.

THIS was an appeal from a sentence of the Vice-Admiralty Court at *Tortola*, condemning this ship and cargo. The vessel sailed on the 25th of *May* 1812, from *Martinique*, then in *British* possession, with a cargo of sugar, the produce of that island, and was captured on the 29th of the same month, by His Majesty's sloop *Dominica*, at a short distance from *Porto Rico*, to which place she was steering at the time of capture.

JUDGMENT.

Sir *W. Scott*.—It is admitted that this ship was going into the *Spanish* island of *Porto Rico*, with a cargo of sugar, laden at *Martinique*, (then become a *British* colony, and subject of course to the *British* laws of revenue, and I take it to be an admitted maxim in law that when a foreign colony becomes a *British* colony the *British* laws of revenue immediately attach, though she was ostensibly consigned to *Nova Scotia*, on account of the laders resident at *Martinique*. She was taken on the 29th of *May* 1812, by His Majesty's sloop *Dominica*, under the command of Captain *Hockings*, and upon the ground, as he asserts in an affidavit bringing in the ships papers, of her being about to import this cargo of *British* plantation produce and manufacture into the *Spanish* colony of *Porto Rico*.

A claim on behalf of *British* proprietors was given the next day by the master, alleging, in the affidavit, his intention to go to *Nova Scotia*, with liberty to touch at *St. Thomas's*: that he was unable to fetch

The FRIENDSHIP.

February 11th, 1814.

that iſland, and that his reaſon for going to *Porto Rico* was ſolely to procure water and proviſions, being ſcantily provided with thoſe articles; that he would have furniſhed himſelf with proviſions at *Martinique*, but that it was impoſſible, from the ſcarcity which prevailed there, to procure them in that iſland. I obſerve he ſays nothing about any ſcarcity of water there.

Nothing is clearer than that this proceeding, on both ſides opens a direct queſtion of fact perfectly underſtood by both parties. The one ſtates, expreſsly, the ground of ſeizure; the other expreſsly negatives it. There is no pretence to ſay, after theſe documents, that the party is taken by ſurprize, and condemned for he knows not what. He had been diſtinctly told, at the time of ſeizure, that the reaſon aſſigned for it was, that he was going into *Porto Rico* to ſmuggle. He diſtinctly apprehended this to be the ground of proceeding as well as ſeizure, for he himſelf confines his defence to a negation of that charge, and that charge only; ſo that there is all the ſubſtantive knowledge poſſeſſed by him that could have been conveyed to his mind by the moſt regular and formal circumlocution of articles, or an information. He knows the fact, and he knows the criminality,—that it is to ſmuggle, to introduce *Britiſh* plantation produce and manufacture into a foreign ſettlement. After this, it is not fairly open to him to allege ſurpriſe, or to take advantage of omiſſions (very unaccountable, certainly,) in a ſubſequent ſtage of the proceedings,—in the libel, although it muſt be matter of ſurpriſe that ſuch a document ſo conſtructed, with ſuch violations of the rules, not only of good pleading, but of common grammar and common ſenſe, ſhould find its way from the hand of any practitioner into the regiſtry of any Court.

It

The FRIENDSHIP.

February 11th, 1814.

It is *called* an allegation.—After charging the declaration of war againſt *France* and the prize-commiſſion to the Vice-Admiralty Court at *Tortola*, (neither of which have any thing to do with the caſe,) it charges the ſlave trade act, and the having ſlaves on board, which have as little to do with it; and then ſtates, in three articles, commencing with, *Whereas it is ſo and ſo provided by the ſtatutes referred to*, and then, without any correlative to theſe *Whereases*, without the aſſertion of any one fact that contravenes theſe enactments, it concludes that all theſe premiſes (what premiſes?) are true, and prays a condemnation, as prize, of the ſhip, cargo, and ſlaves, as *the property of the enemy*; a matter that is at an entire diſtance, not only from the fact itſelf but from the contemplation of it,—by the ſeizor,—by the Court,—by the defendant,—in ſhort, by every perſon whoſe attention was ever called to the tranſaction. The true iſſue, however, having found its way into the cauſe itſelf, I ſhall not hold it to be vitiated and annulled by this ſtrange inſtrument, which really tranſcends all the meaſures of indulgence which this Court is in the habit of ſhewing to the proceedings of any of the inferior Courts. I cannot diſmiſs it without recommending to the notice of the particular Court a little more attention, not only to the laws of pleading in criminal caſes, but even to the laws of grammar in all caſes whatever.

This objection being diſpoſed of, it becomes me to take notice of another, which has been urged againſt the juriſdiction generally. An objection certainly not to be favoured, as coming from a party who voluntarily and without any proteſt, claimed redreſs in the original Court; and there not meeting with the redreſs he claimed, *himſelf* reſorts to the Court of appellate

The FRIENDSHIP.

February 11th, 1814.

pellate juriſdiction, affirming thereby, as far as his continued acts could do, the authority of the general juriſdiction. But, without reſorting to any admiſſion of his or any affirmance of juriſdiction by his own acts, I think that, in the preſent ſtate of the law, no real queſtion can be excited upon the ſubject, whatever might have been the caſe at an earlier period, when the language of the law was not only leſs definite, but leſs applicable to the preſent eſtabliſhment of theſe Courts. It is not neceſſary for me to trace the hiſtory of this juriſdiction in the colonies, which has certainly varied at different times, according to the ſuppoſed exigencies of public affairs. Times may have been when no ſuch Courts exiſted there, or if they did, were not armed with theſe powers. But theſe are now become queſtions of mere antiquarian curioſity and reſearch, when the law has declared, by its moſt recent enactments upon the ſubject, (8 G. 3. *c.* 2[illegible], and 49 G. 3. *c.* 107,) that the Court of *Tortola* is of ſufficient proximity to the cauſe of forfeiture to anſwer the requiſites of the ſtatutes, provided the facts are, in their own nature, ſuch as are cognizable in this ſpecies of juriſdiction generally.

The fact charged is, that of entering a *Spaniſh* ſettlement to ſmuggle; and another objection which has been taken is, that the offence, if it exiſted in intention, exiſted *there only*, and was not conſummated, for the veſſel had not entered the harbour of *Porto Rico*, and much leſs was there the *corpus delicti* required by one particular ſtatute (22 & 23 *Car.* 2, *c.* 26.); for by that it is requiſite (as far as the language of the ſtatute indicates) that the importation ſhould be conſummated by *laying the goods on ſhore*. But the law has never been ſo conſtrued. This later ſtatute (22 & 23 *Car.* 2. *c.* 26.) contains a regulation reſpecting the

board

bond, and the penalties for an actual violation of the bond, which had been impoſed by one of the ſections of the foregoing act (12 *Car.* 2. *c.* 18. *ſ.* 19.); but it never could be meant to repeal the offence created by the former act. It never could be the intention of the Legiſlature to tread back its own ſteps, and to declare that *an actual landing* ſhould be required to conſummate the offence, when it had declared *that—the ſhipping with intent,—the carrying with intent,—the conveying with intent,—the tranſporting with intent, that they ſhould be there laid on ſhore*, perfects the offence. *Principiis obſta* is the principle of the rule. It does not wait till the offence becomes indefeaſible by a ſecure lodgment of the cargo in the foreign port, where evidence of the fact can be with difficulty procured; and when the gain of the importation may be made to countervail the preſſure of the penalties. The principle of the law is to arreſt the miſchief in its progreſs; to make it, not only penal, but barren and unproductive. The very intent is to prevent the importation into the foreign country; and it would be a ſtrange conſtruction to ſay, that you ſhall not prevent,—you ſhall only puniſh after the thing has been done; I think, I may ſay confidently, that ſuch a narrowing conſtruction has never been once practically applied to the later of thoſe ſtatutes.

Theſe conſiderations bring me to the facts of the caſe. It is admitted that the veſſel was going to *Porto Rico*—indeed that ſhe had actually put into a port of that iſland (*Fabardo*), and was proceeding to *Porto Rico* itſelf, which it appears that this ſhip had ſtumbled into on the preceding voyage under a misfortune, and with a cargo preciſely of the like kind, which was there landed, and diſpoſed of. Now the

preſumption

The FRIENDSHIP.

February 11th, 1814.

preſumption of law is clear, that, unleſs a neceſſity is fairly created of entering ſuch a port, a ſimilar purpoſe is to be concluded. The intent of diſcharging the cargo muſt be completely purged. How is that done in the preſent caſe? The maſter aſſerts, that, at the iſland of *Martinique*, wood and proviſions could not be obtained: that is a ſtartling aſſertion; but taking that to be the fact, water ſurely could have been provided in ſufficient plenty, and if he did not provide it, he cannot take the benefit of his own imprudence in that reſpect, nor charge his deviation upon it. And yet it is the only ground on which he charges it; for he admits, that he had proviſions ſufficient for his voyage with œconomy; and it is water, and water only, that he calls out for on his voyage to *Porto Rico*. At *Fabardo*, where he firſt ſtopped, they would give him fire-wood, but by the moſt unintelligible parſimony, no water; and he is compelled to go on to a rich and flouriſhing city to obtain that moſt neceſſary but moſt plentiful of all commodities. He diſclaims then, the neceſſity which he ſets up in the claim, namely, want of proviſions, of which he enumerates a very beggarly ſtatement, though now, upon examination, ſufficient with œconomy for his whole voyage. This inconſiſtent account, if it ſtood ſingle and unimpeached, could not be accepted. One pretence is, that he was going to *St. Thomas*, for convoy, amongſt other things. This is depoſed to by himſelf and his mate, who can ſpeak to the *Halifax* deſtination merely from the information which he received from the maſter, for he knows nothing of it himſelf. He ſays, they remained for four hours at *Fabardo*, and took in two boat-loads of fire-wood, and nothing elſe. The carpenter firſt ſaw her at *Fabardo*, four months ago.

ago. The maſter, he ſays, told him, that he was afraid to go to *St. Thomas's*, as he might meet with men of war there; "that he believes, from this circumſtance, that the ſhip was deſigned not for *St. Thomas's*, but for *Porto Rico*, where ſhe was actually going, that they could have got into *St. Thomas's*, if it was the intention of the maſter to have ſtopped there; that he paſſed that port, and that he believes the cargo was deſtined to *Porto Rico*; that, after the man of war's boat had left her, the maſter ordered the cabin-boy into the cabin for a ſmall gimblet, which he brought up. He then deſired the deponent to bore one of the water-caſks, and let out the water; he accordingly bored two holes, and ſtarted the water. That the officer aſked him what thoſe two holes were? and he ſaid they were worm-holes. This is the account given by the carpenter, and he is confirmed in all reſpects by the cabin-boy.

Upon this evidence it is impoſſible to ſay that the defence is ſuſtained; that any neceſſity is ſhewn or acted upon in the way in which it would have been if it had really exiſted. But the caſe does not reſt on the mere failure of proof. I think there is affirmative evidence of a credible nature to eſtabliſh a concluſion of fraud. An original intention purſued with all the diligence and all the artifices that could be deemed neceſſary to ſecure a ſafe introduction of this cargo into this prohibited port: and that the caſe ſtands fairly expoſed to the penalties of the ſtatute, under a competent detection of an illegal deſtination. I ſhall therefore affirm the ſentence of the Court below, condemning this ſhip and cargo.

JOHN, BUCHANAN.

February 25th, 1814.

The Court of Admiralty cannot entertain an appeal from the ſentence of a Vice-Admiralty Court not duly appointed.

THIS was an appeal in a cauſe of poſſeſſion from the ſentence of a pretended Vice-Admiralty Court, in the iſland of *Guadaloupe*.

The counſel for the reſpondents objected to the juriſdiction of the High Court of Admiralty, contending that there was no Court of Vice-Admiralty legally appointed at *Guadaloupe*; and that no appeal could be received from the ſentence of a Court not duly authorized.

Enquiries were directed to be made with reſpect to the manner in which the Court at *Guadaloupe* had been conſtituted; when it appeared that it had been eſtabliſhed by the ſuppoſed authority of the governor, without any direction from the Crown, or from the Lords Commiſſioners of the Admiralty, for that purpoſe.

For the appellant it was argued, that the Court of Admiralty would not look very minutely into the conſtitution of the inferior Court, but would entertain the appeal, in order to prevent a failure of juſtice, and to redreſs the injury which had been committed by an erroneous ſentence of a Court, however conſtituted. They cited the caſe brought before the Court of Admiralty from the irregularly conſtituted Court of Vice Admiralty at *St. Nichola*, in *St. Domingo*. (*Thomas*, *M'Quay*, 1ſt *Robinſon*, 322.)

Court.—The preſent inclination of my mind is to conſider this cauſe as not depending before me. The Court below not having been eſtabliſhed by competent authority, the proceedings before it are a mere nullity,

The JOHN.

February 25th, 1814.

and there exiſts no foundation for the appellate juriſdiction of this Court. The caſe is very different where the ſentence of a Vice-Admiralty Court, regularly conſtituted, is pronounced to be null and void on other grounds. There, though the ſentence of the Court below is declared to be a nullity, its authority over the ſubject matter, and its right to entertain the ſuit, remain entire and uncontradicted. This Court may then examine, and indeed *muſt* neceſſarily examine, into the caſe; but here, where the Court from which the pretended appeal is brought, has no original juriſdiction, it is difficult to ſay that the appeal can be well founded. In the caſes which have been mentioned, the proceedings were here inſtituted *de novo*, and carried on without any regard to what had paſſed in the pretended Court at *St. Domingo*: and it is quite clear that the caſes muſt have been ſo conducted, for they were *prize-caſes*, and, if they had been heard upon appeal, muſt of neceſſity have been carried before the Lords of Appeal, and not before the Court of Admiralty, which, as at preſent conſtituted, has no appellate juriſdiction in matters of prize. I ſhall not, however, entirely diſpoſe of the queſtion at this time, but reſerve it for further conſideration. I really do not ſee how I can pronounce any deciſion whatever. The Vice-Admiral appears to have appointed a Court which neither he nor the Lords Commiſſioners of the Admiralty had any authority to appoint. According to the preſent impreſſion of my mind, there is nothing before the Court upon which it can proceed to adjudicate. I will, however, take ſome little time for conſideration.

The Court on a ſubſequent day diſmiſſed the cauſe.

February 25th, 1814.

ANGERONA, Marks.

Where the master has been under the necessity of selling part of the cargo to defray the expences of the ship in a foreign port, the owners of the cargo, if they have been the authors of the delay by which the expences were occasioned, have no right to deduct the whole or any part of the freight from the holder of a bottomree bond previously granted on the ship and freight.

THIS ship, whilst laying at *St. Petersburgh*, was chartered, on the 30th of *May* 1812, to Messrs. *Hill* and Son, to bring a cargo from that place to *Woolwich*. By the conditions of the charter-party, sixty running days were to be allowed for the loading and unloading the cargo; which running days were to be computed from the time when the vessel was reported to be ready to receive the cargo, to cease when the cargo was on board, and to recommence on the arrival of the ship at her port of discharge. Freight was to be paid *upon delivery of the goods*, after the rate of £9. for every ton of hemp, with 10 per cent. on the amount thereof for primage, and ten shillings and sixpence per ton for gratification-money to the master; and the freighters were to be at liberty to detain the ship beyond the sixty running days, upon payment of six guineas per day. On the first of *August*, the master gave notice that the ship was ready to receive the cargo on board; but the loading was not begun till the 15th of the same month, and was not completed till the 8th of *October*. The master put to sea on the 11th of *October*, and steered for *Hanno*; but before his arrival there, the convoy for *England* had sailed. He was then ordered by one of the commanders of H. M. ships on that station to proceed to *Matwick*, which he accordingly did; but not finding a convoy there, and the frost having set in, he proceeded under orders to *Carlscrona*, and wintered in that port. Being in want of necessary articles for the use of his ship and the crew, he

The ANGERONA.

February 25th, 1814.

he procured ſome money from Mr. *Aſkmalin*, a merchant at *Carlſcrona*; to whom he gave a bill of exchange for the amount upon a houſe of trade at *Gottenburgh*; but the bill being diſhonoured, and the maſter unable either by bottomree or otherwiſe to procure money to diſcharge the debt, proceedings were inſtituted by Mr. *Aſkmalin* in the proper court at *Carlſcrona*, which iſſued an injunction to the maſter not to leave the port, and ordered the ſale of a part of the cargo to recover the amount of the ſums which had been advanced for the uſe of the ſhip. Fourteen tons of hemp were accordingly ſold under the directions of the Court, and the proceeds of the ſale were applied to the liquidation of the debt. The veſſel then ſailed for *England* with the remaining part of the cargo. On the arrival of the ſhip in this country, an action was entered againſt the ſhip and freight, in the ſum of £5,000. on behalf of the holders of a bottomree-bond, which the maſter had granted at *St. Peterſburgh* before the commencement of the preſent voyage. The bond was pronounced for by the Court, its validity not being conteſted. The ſhip was afterwards ſold under a decree of the Court, and the net proceeds, amounting to £1,458. 16*s*. 7*d*. were brought into the regiſtry. The owners of the cargo gave bail to anſwer the action, ſo far as reſpected the freight, and to pay ſuch freight as the Court ſhould decree to be due. They then brought in the ſum of £1,473. being the amount of freight due for the part of the cargo that was actually brought to *Woolwich*, deducting therefrom the value of the goods ſold at *Carlſcrona*. The account was objected to on the part of the bond-holder, and the matter was referred in the uſual manner to the regiſtrar and merchants,

The ANGERONA.

February 25th, 1814.

who reported that the whole freight, amounting to £2,687. 11s. was due, and ought to have been brought into the regiſtry. This report of the regiſtrar and merchants was objected to on behalf of the owners of the cargo; and the queſtion to be decided was, whether it ſhould be confirmed by the Court, or referred back to the regiſtrar and merchants for alteration.

For the owners of the cargo, *Jenner* and *Herbert* admitted that the maſter might be juſtified in ſelling a part of the cargo at *Carlſcrona*, but contended that freight was due only for the goods delivered at *Woolwich*; and that the owners of the cargo had a lien on the freight in their hands for the amount of the goods ſold, as without ſuch ſale the ſhip could not have proceeded on her voyage, and conſequently no freight could have been earned: That the freighters were not bound to pay more to the bondholder than they would have been to the owners of the ſhip, to whoſe rights the bondholder ſucceeded: That the money produced by ſale of the goods at *Carlſcrona*, and expended upon the ſhip, was to be conſidered as a mere advance of the freight, which had ſince been earned by bringing the other part of the cargo to the port of deſtination. (*Conſtantia*, *Harleſſen*, *Edwards's*, 232.) (*Gratitudine*, *Muzzolla*, 3d *Robinſon*, 240.) That money ſo procured and expended was to be conſidered as a kind of forced loan upon bottomree, and ſubject to the ſame conſideration as if it had been borrowed upon a bond of that deſcription. *Emerigon*, (vol. 2. 446.) *Conſolato*, (c. 105.) (*Valin*, *Liv.* 3, tit. 3, *du Fret ou Noulis*, *Art.* 14.) If ſo, the owners of the cargo ſtand in the ſame ſituation as the holders of a bond of later date, and are therefore entitled to priority of payment, and conſequently

conſequently to retain the freight, ſo far as to indemnify themſelves for the goods which were ſold. (*Rhadamanthe*, *Mayer*, ſupra 201. (*Æolus*, *Mynne*, ſupra 300).

For the bond-holder, *Adams* and *Goſtling* argued to the effect of the obſervations contained in the judgment of the Court, and cited *Abbot*, 260.—*Parke on Inſurance*, tit. *Bottomry*.

JUDGMENT.

Sir *W. Scott*.—This is a queſtion reſpecting the regiſtrar's report, in which he has allowed full freight on the entire cargo, although a part of it had been diſpoſed of, in order to enable the ſhip to complete her voyage. The veſſel was chartered to bring a cargo from *St. Peterſburgh* to *Woolwich*, and ſailed upon her deſtined voyage on the 11th of *October*, but was obliged to put into *Carlſcrona*, where the maſter incurred conſiderable expences on acçount of the ſhip. Being unable to prevail upon any perſon there to lend him money on bottomree or otherwiſe, he was compelled to ſell, and did ſell, part of his cargo, to raiſe a ſupply for the diſcharge of his debts. A bottomree-bond, it appears, had been before executed at *St. Peterſburgh*, the validity of which bond is not conteſted. It is not ſtated under what circumſtances this bond was executed; but I am to preſume, from the acquieſcence of the parties, that it was properly entered into. As nothing is ſtated to the contrary, it is a fair inference, that the bond was granted under ſuch circumſtances of neceſſity as would juſtify the maſter in reſorting to an expedient of this deſcription.

There is no imputation of delay upon the maſter; no charge is made againſt him by the owners of the

The ANGERONA.

February 25th, 1814.

cargo, that he was guilty of negligence in preparing for the voyage, or that he either did or omitted to do any thing which might have effected the due profecution of it. It is quite clear too that he was compelled, by a neceſſity of the moſt imperious kind, to ſell part of the cargo at *Carlſcrona*; for it appears that proceedings were inſtituted againſt the ſhip, and a judicial order made for its ſale. There is a total abſence of all appearance of fraud.

The queſtion then is, upon whom the loſs which has enſued ſhall fall? Whether it ſhall be ſuſtained by the owners of the cargo, or the holders of the bottomree-bond? Whether the owners, to indemnify themſelves, have a right to withhold the whole or any part of the freight? Now if I had to determine that queſtion in the abſtract, I ſhould certainly take time to look into the authorities which have been cited, and to deliberate upon them; but it appears to me that I am not called upon in the preſent caſe to decide that important queſtion. It is averred that the delay was occaſioned altogether by the owners of the cargo; that they neglected to put their goods on board in due time, by which means the convoy was loſt, and the ſhip compelled to winter at *Carlſcrona*, where the expences were neceſſarily incurred. This ſtatement is not contradicted by the owners of the cargo; and I muſt therefore preſume that they have it not in their power to contradict it. I muſt take the fact as laid in the act on petition, and as depoſed to by the maſter in his affidavit. If ſo, the expences were incurred through no fault of the maſter or of the veſſel, but are to be imputed entirely to the owners of the cargo. The goods, it appears, were not all put on board till the 8th of *October*, and the ſhip actually ſails on the 11th, within

within three days afterwards, an interval not longer than was abſolutely required to obtain the neceſſary clearances. Who then are the authors of the delay by which the expences were occaſioned? According to the ſtatement which has been made, and not contradicted, and upon which therefore I muſt determine this caſe, not the owners of the ſhip, but the freighters. I underſtand that the ſame facts were ſtated to the regiſtrar and merchants, and had great weight with them in leading them to the concluſion to which they have arrived. I have no heſitation in confirming their report.

The Court likewiſe decreed payment of the primage and gratification-money to the maſter, in caſe there ſhould be any ſurplus after the bond was diſcharged.

The ANGERONA.

February 25th, 1814.

CHARLOTTA, DUPLEIX.

March 11th, 1814.

JUDGMENT.

SIR *W. Scott.*—This ſhip is a *Ruſſian* ſhip, and has been reſtored as ſuch, not having been found guilty of the offence with which ſhe was charged,—a breach of the blockade of an *American* port. She was ſeized whilſt lying in the port of *Cork* with a cargo of very conſiderable value, conſiſting of tobacco, ſtaves cotton, and other goods; and thoſe goods have been claimed not as *Ruſſian* property, but for *Britiſh* ſubjects, by Mr. *Church*, the ſupercargo, on behalf of himſelf and Meſſrs. *Graham*, Brothers, and company, of *Glaſgow*, merchants.—Mr. *Church* is a natural-born ſubject of the Crown of *Great Britain*, who appears

The conſent of the Crown is neceſſary to legalize the trade of *Britiſh* ſubjects with the enemy; and parties trading with the enemy without ſuch authority cannot be permitted to aver their ignorance of the law.

The CHARLOTTA.

March 11th, 1814.

not to have forfeited his national character by a ſettled domicil in any other country, and is therefore to be conſidered a *Britiſh* ſubject. The courſe of the tranſactions in which this ſhip has been engaged is particularly deſcribed in the evidence given by him upon his examination. He ſtates that the ſhip was deſtined to the port of *Belfaſt*, although the bill of lading deſcribes the deſtination to *Gottenburgh*. He ſays that "ſhe was "provided with a *Ruſſian* paſſport, and that he ſailed "from *Archangel* about the 28th of *September* 1812, "having on board a cargo of wheat, ſail-cloth, cordage, "and iron, which he ſold at *Liſbon*; from whence "he proceeded to *St. Ubes*, for a cargo of ſalt, which "he carried to *New York*, where he expected to ob-"tain a cargo of flax-ſeed, having procured an *Engliſh* "licence for that purpoſe; but, owing to the great "length of the voyage, and the damage which the "ſhip ſuſtained, ſhe was obliged to undergo conſider-"able repairs at *New York*, and thereby loſt the ſea-"ſon during which flax ſeed might have been ſhipped: "that a report of the blockade of the port of *New York* "prevailing, although no notification had been given "of it, he applied to the *Ruſſian* conſul for advice, "who recommended him to leave the port in ballaſt, "in order to avoid moleſtation, which he accordingly "did, and proceeded in ballaſt for *Oranocke*, in *North* "*Carolina*; but, prior to his arrival there, was cap-"tured by Admiral *Cockburn*, who was going to take "poſſeſſion of that place, for the purpoſe of obtaining "proviſions: that after the ſhip had been detained "about two days, and had her papers over-hauled, "Admiral *Cockburn* gave him permiſſion to proceed "with the ſhip to the port of *Beaufort*, where he "and his crew were detained about ſeventeen days

"by

The CHARLOTTA.

March 11th, 1814.

" by the *Americans*; but they were afterwards re-
" leaſed, and the ſhip was allowed to enter, and take
" on board her preſent cargo." And, in anſwer to a ſubſequent interrogatory, he ſays that " the reaſon
" of his taking in a freſh cargo was, becauſe he learnt
" that a bill of £350 ſterling, which had been drawn
" by him at *Liſbon* on Meſſrs. *Scott*, *Burn*, and Com-
" pany, of *London*, agreeably to the authority which
" he had received from Mr. *Solomon Van Briemen*, of
" *Archangel*, had not been honoured. He determined
" not to negotiate any more paper on the ſaid Meſſrs.
" *Burn* and Co. leſt they ſhould likewiſe be diſhonoured,
" and to take no goods but on freight, except ſuch as
" he was able to purchaſe for his own account; and
" having, on his journey from *Beaufort* to *New York*
" met with Mr. *Silas Pearſon*, who made him an offer
" to ſhip tobacco on freight, which he had at that
" time declined to accept, he wrote to the ſaid Mr.
" *Silas Pearſon*, who was then at *Newburn* in *Carolina*,
" that he was now willing to take his tobacco on
" freight; in conſequence of which the ſaid *Silas*
" *Pearſon*, who was glad of any opportunity of ſhip-
" ping the tobacco he had collected in the execution
" of his agency, cauſed the tobacco now on board the
" *Charlotta* to be loaded, and, as the deponent
" believes, ſuperintended himſelf ſuch loading, by
" going backwards and forwards to *Beaufort* from the
" different places where he had collected the ſaid
" tobacco. That whilſt he was at *New York*,
" he procured by means of Mr. *J. G. Bogert*, the
" *Ruſſian* conſul there, the preſent maſter of the
" *Charlotta*, *George Dupleix*, whom he ſent over-land
" from *New York* to *Beaufort*; and when he ſo re-
" turned to that place, he found all the tobacco on
" board."

The CHARLOTTA.

March 11th, 1814.

"board." It appears that he ſailed on the preſent voyage, intending to carry his cargo to *Belfaſt*; but being obliged by ſtreſs of weather to put into *Cork*, he was there ſeized by the boats belonging to ſome of His Majeſty's ſhips then lying in that harbour, on ſuſpicion that the veſſel was *American* property.

This ſtatement bears upon the face of it every appearance of fairneſs, and I think it may be ſaid that there is a total abſence of all fraud. No one circumſtance connected with the tranſaction appears to be in the leaſt degree miſrepreſented or diſguiſed. There is one fact, however, to which the Court cannot ſhut its eyes, namely, that it is the act of *Britiſh* ſubjects trading with the enemies of this country. It is not neceſſary for me to ſtate that the parties are bound to ſhew by what authority they have entered into a commerce of this illegal deſcription; for there is no principle of law more recognized than this, that during the exiſtence of hoſtilities between the Crown of *Great Britain* and other countries, it is unlawful for *Britiſh* ſubjects to carry on a commercial intercourſe with the inhabitants of thoſe countries. The conſent of the Crown to ſuch a courſe of trade muſt neceſſarily be interpoſed in ſome way or other. The particular mode in which this conſent may be expreſſed is not material. It may be ſignified in a variety of ways,—by a licence granted to the individual for the ſpecial occaſion, by an order in council, by proclamation, or under the authority of an act of parliament, to which the Crown is neceſſarily a party.

If it can be ſhewn, then, that the conſent of the Crown has on this occaſion been expreſſed, either by licence, by order in council, or by act of parliament, which can by fair and legal conſtruction be brought to bear upon it, that would

The CHARLOTTA.

March 11th, 1814.

would be sufficient for the protection of the parties; and it is impossible not to wish that a transaction, which has been conducted with all possible fairness, should have the protection of the law as far as it can be given. The particular authority under which the present transaction is attempted tobe justified, is a proclamation issued by the lord lieutenant of *Ireland*, dated the 12th of *February* 1808, by virtue of an act of parliament passed in the 45th year of this present Majesty's reign. It is a proclamation, therefore, which does not derive its effect from the power of the lord lieutenant of *Ireland*, but which arises expressly from the statute. It is indeed impossible to maintain that the lord lieutenant possesses any such power independent of the act of parliament. We all know that, even before the union subsisted between the two countries, *Ireland*, with respect to its external relations, was bound by the proclamations issued under the authority of the Crown of *Great Britain*. The representative of the King in that country had no power to release subjects from their allegiance, and consequently could not release them from the obligation of abstaining from commercial intercourse with the enemy. The whole foundation then of the matter, and the root of the legality, if it exists, is to be found in the act of parliament fairly and legally construed. I have looked with all the diligence I could into the act of parliament, and with every desire to find that it legalized the transaction in question; but I am sorry to say that the result of my enquiry has been unfavourable, and that my final determination must be contrary to the wish which I have expressed. I conceive it to be quite clear, that the only operation of the act is to take off those restraints which were im-

The CHARLOTTA.

March 11th, 1814.

poſed by the navigation-laws upon the foreign trade of the country, and in no degree to relieve the parties from the diſability to carry on commerce with the enemy. The act of parliament, however it may have been underſtood, or rather miſunderſtood, in *Ireland*, was never intended to legalize a trade with the enemy without the authority of a licence from the King. There is one part of the tranſaction which ſhews that the parties themſelves entertained the ſame opinion with reſpect to the powers given by the ſtatute. The fourth ſection of the act applies to the importation of flax-ſeed; yet when it was intended to import that commodity, they thought proper to apply for a licence ſo to do: and it is poſitively ſworn by Mr. *Church* that he had a licence for this flax-ſeed. Now if a licence was neceſſary for this, then it was neceſſary for the other alſo; for the language of the fourth ſection is ſimilar to the ſixteenth, and therefore a licence is as neceſſary in one caſe as in the other. But, without going through the act of parliament, I am clearly of opinion that it is impoſſible to maintain that it does more than what I have deſcribed, namely, to take off the reſtraints impoſed by former acts; and by no means authorizes the ſubjects of this country to carry on trade with the enemy. I am under the neceſſity of ſaying that the ignorance which is held out as a ſhelter to this tranſaction, can afford it no protection whatever. If it has proceeded from a private error of the party, he muſt abide by the conſequences of that error, becauſe the ſubjects of this country are bound to conſtrue rightly the ſtatute law of the land; it is not competent to them to aver in a court of juſtice that they have miſtaken the law; it is a plea which no court of juſtice is at liberty to receive. If it was to be conſidered as

The CHARLOTTA.

March 11th, 1814.

the error of the party alone, I ſhould at once have proceeded to the condemnation of the property; but here is another conſideration which is entitled to attention, though the law muſt ſtill take its courſe;—if the Government of that country has fallen into an error, and has followed a courſe of practice which may have led its ſubjects into error, then, between them *communis error facit jus*. If the Government has involved itſelf in the tranſaction by permitting entries for importations of this kind to be publicly made at the Cuſtom Houſes, then it would be very unbecoming an honourable government, ſuch as that of this country has for a long time proved itſelf, in whatever hands it may have been placed, to enforce the penalties againſt its ſubjects. Here is a proclamation which is couched in general terms, and does not expreſs one way or the other, whether a licence is neceſſary or not. It is of long ſtanding, being dated the 12th of *February* 1808, and it is true that it had been revoked before this ſeizure; but the ſhip came into port perfectly ignorant of the revocation. As this Court is bound to enforce the law, I am under the neceſſity of condemning the property; but at the ſame I moſt earneſtly recommend this caſe to the equitable conſideration of the Government.

March 17th, 1814.

THE MOLLY, EADIE.

A title to a ship which may have been originally faulty becomes unimpeachable by great lapse of time, especially if it stands upon a sale to a neutral.

THIS ship, in the possession of a *Spanish* proprietor, was seized in the River *Thames*, under a warrant of this Court obtained by the former *British* owner, but at the distance of ten years after the possession of the present *Spanish* proprietor acquired by purchase from the *French* captor, and after proceedings said to have been regularly conducted before the *Conseil des Prises* at *Paris*. *Spain* was in a state of neutrality at the time when the seizure was made; but hostilities were afterwards commenced by that country against *Great Britain*, and these have since terminated in a treaty of peace, by the conditions of which *Spain* has been placed not merely in the character of a neutral, but in that of an ally of *Great Britain*, in the war against *France*.

JUDGMENT.

Sir *W. Scott*.—There are many considerations in this case to repel the party from entering into a discussion of the title to this ship, and particularly that which arises upon the length of time that has elapsed since the purchase was effected. Here has been an uninterrupted possession of ten years; and although the law has affixed no particular period of time after which possession shall not be disturbed, yet it is highly reasonable that there should in practice be some such limitation. It is merely owing to the accident of the ship's coming to this country, that the question is now raised; and it might have been twenty years longer before that event occurred. Can it be said that it would then have been proper to enter upon such an investigation? I think, certainly not. It is, indeed, true as a general principle, *quod non valet ab*

The Molly.

March 11th, 1814.

ab initio, tractu temporis non valet, yet, in practice, ſomething different muſt be obſerved; a title which may have been originally faulty, muſt of neceſſity become unimpeachable by great lapſe of time. It is to be remembered, likewiſe, that this title ſtands upon a ſale to a neutral, and is upon that account to be treated with a greater degree of tenderneſs.

There is, I think, ſomething of *laches* obſervable in the conduct of the original *Britiſh* proprietor. It has been ſaid, that he could not have commenced proceedings at an earlier period, becauſe the ſhip did not ſooner make her appearance in an *Engliſh* port. But it muſt be remembered that *Spain* was neutral at the time of the capture, and that he (knowing as he did, whither the ſhip was carried) might have made his application to the Courts of that country. I will not take upon myſelf to ſay with what ſucceſs ſuch an application might have been attended; but I am bound to preſume that the Courts of *Spain*, which was at that time neutral, would not have ſuffered the claim of a *Britiſh* proprietor to be illegally diveſted. No attempt, however, appears to have been made to regain poſſeſſion of the ſhip by any proceedings in the Courts of that country.

There is another circumſtance likewiſe to be taken into the conſideration of the preſent caſe, and that is, the change of character in the relation of the two countries. *Spain* was at the time a neutral, afterwards an enemy, and has ſince become an intimate friend and ally of *Great Britain*. I will not take upon myſelf to ſay that a treaty of peace puts an end to all queſtions of property between the ſubjects of the States entering into the treaty; perhaps it may be more ſtrictly correct to ſay that it quiets all titles of poſſeſſion ariſing out of the war only. At the ſame time when a treaty of peace has been

Strictly ſpeaking, a treaty of peace quiets all titles of poſſeſſion ariſing out of the war *only*, but the revival of any grievances ariſing before the war is not to be encouraged after ſignature of a treaty of peace.

The Molly.

March 11th, 1814.

been concluded, the revival of any grievances arising before the war comes with a very ill grace, and is by no means to be encouraged. Treaties of peace are intended to bury in oblivion all complaints; and if grievances are not brought forward at the time when peace is concluded, it must be presumed that it is not intended to bring them forward at any future time.

Now, upon all these considerations, the claim having been made only upon the accidental arrival of the vessel in a port of this country, after a lapse of ten years, and after such changes in the relative situations of the two countries, I should feel very great reluctance in disturbing the possession of the *Spanish* proprietor. Under such circumstances, it cannot be the duty of the Court to look minutely into the title, but rather to supply the defects, if any such should be found to exist. The title, however, does not appear to be materially defective under the evidence now produced. Length of time alone may sufficiently account for the non-production of documents. The owner, perhaps, might not think it necessary, after ten years possession, to preserve with exact care and to carry about with him all the title deeds. The Court has been called upon to look into the character in which the *Conseil des prises* acted, whether it proceeded upon its original or its appellate jurisdiction: but this is a question upon which it does not feel itself called upon to enter on the present case. I shall presume that the proceedings before the *Conseil des prises* were regularly conducted, and shall direct the warrant of arrest to be superseded, but without costs.

GEORGIANA, PITTS.

April 26th, 1814.

THIS was the caſe of a *Britiſh* ſhip engaged in the whale-fiſhery, which was captured in the *South Seas*, on the 28th of *April* 1813, by the *American* frigate *Eſſex*, and recaptured on the 28th of *November* by His Majeſty's ſloop of war *Baroſſa*. When taken by the *American* frigate, ſhe was laden with a cargo of oil, and had eight guns and twenty-five men on board. The captain of the *Eſſex*, without carrying the veſſel into port, or taking out the cargo, ſupplied her with ten additional guns and ſixty men, and employed her under the command of one of his lieutenants, to cruize againſt the other *Britiſh* veſſels in thoſe ſeas, three of which were by this means actually taken. The force with which ſhe had been ſupplied was afterwards reduced, and only four guns and fifteen men were found on board at the time when the recapture took place. The queſtion was, whether this veſſel ſhould be condemned as prize to the re-captors, or reſtored upon ſalvage to the *Britiſh* owners.

The mere employment of a ſhip in the military ſervice of the enemy is not a ſufficient *ſetting forth for war* to entitle the re-captor to condemnation under the terms of the prize act; but if there is a fair ſemblance of authority in the perſon directing the veſſel to be ſo employed, and nothing upon the face of the proceedings to invalidate it, the Court will preſume that he was duly authorized; the commander of a ſingle ſhip may be veſted with this authority as well as the commander of a ſquadron.

For the Re-captors, the King's Advocate and *Phillimore* contended for condemnation, under the authority of the *L'Actife*, *Lorriol*, (*Edwards*, 185,) and the *Ceylon*, *Mulac*, (ſupra 105.)

For the Owners, the Advocate of the Admiralty and *Adams* contended, that though the ſhip had been uſed by the enemy for military purpoſes, ſhe had not been "ſet forth for war" by any perſon poſſeſſing a competent authority for that purpoſe.—That the captain of a ſingle frigate had no power to grant letters of marque,

The GEORGIANA.

April 26th, 1814.

marque, or to commiſſion other veſſels to act as public ſhips of war; and that great inconvenience might ariſe from the permitted exerciſe of ſuch an authority.—That the Court had never gone farther than to allow *to the commander of a ſquadron* the authority to enliſt ſhips into the military ſervice of the ſtate.—That the mere act of putting men on board from a privateer, and afterwards uſing the veſſel as a ſhip of war, had been held an inſufficient "ſetting forth for war," to ſatisfy the terms of the prize act. (*Horatio Nelſon*, 6 *Robinſon*, 120.)—That the employment of this veſſel reſembled that of a tender to a man of war, which deſcription of veſſel is not commiſſioned, and is incapable of taking prizes for its own benefit.—That the *American* Government could not have approved the conduct of the commander of the frigate in weakening his crew, by detaching an officer and men on board this ſhip, and probably would not have confirmed the appointment made by him.—That neutral merchant veſſels were not bound to ſubmit to viſitation and ſearch from a veſſel ſailing under a pretended commiſſion of this kind.—That there was a ſuſpenſion only, and not an obliteration, of the mercantile character of the veſſel.—That there was even leſs force on board at at the time of re-capture than when ſhe ſailed as an *Engliſh* trading veſſel.

The Court decreed reſtitution of the cargo, but reſerved its deciſion with reſpect to the ſhip.

May 3d.—An application was made to the Court to admit an affidavit from one of the witneſſes, who had been examined at the *Bermudas*, where the prize was in the firſt inſtance carried. The Court obſerved, that the examinations were ſo imperfectly taken, that it

should on that account feel leſs heſitation in admitting any affidavit explanatory of the depoſitions, and ſupplying the deficiences in the original evidence.

JUDGMENT.

Sir *W. Scott.*—The depoſitions in this caſe were taken in ſo imperfect a manner, that I was induced to admit an affidavit explanatory of ſome circumſtances, reſpecting which the Court was left very much in the dark. But I think that the affidavit which has been offered is not admiſſible in its preſent form. A great part of it contains merely a repetition of what has been already ſtated in the depoſitions, and another part of it appears to be ſtill more exceptionable; for it amounts almoſt to a direct contradiction of what the witneſs had depoſed to upon his original examination. He there ſays, that "he knows ſhe had a commiſſion from the "captain of the *American* frigate *Eſſex*, to cruize "againſt the ſhips of His *Britannic* Majeſty." This is now attempted to be diluted and explained away by his affidavit, in which he ſwears, that "he did not "mean to ſay ſhe had any commiſſion in writing, but "merely that the power or authority ſhe had for ſo "doing was derived from captain *Porter*; that he "never ſaw or heard of any ſuch commiſſion in writ-"ing." I think it would be dangerous to admit an affidavit containing ſo total a departure from the former ſtatement made by the ſame witneſs. I cannot permit ſo direct and poſitive aſſertion to be withdrawn. The ſtatement, which follows in the affidavit, is founded on converſation only. He ſays, that "he heard re-"peatedly from the officers and crew that the *Eſſex* "had ſailed as a ſingle ſhip from *New York*, on a "cruize to the coaſt of *Braſil*, and that ſhe was not "victualled

The GEORGIANA.

April 26th, 1814.

" victualled or ſtored for a longer cruize; but that " captain *Porter*, hearing there were a number of *Britiſh* veſſels round *Cape Horn*, did, of his own accord, " and without any inſtruction from his Government, " proceed round *Cape Horn* to the coaſt of *Chili* " and *Peru*." Now this is a matter upon which the Court does not require any explanation. Captain *Porter* was cruiſing in thoſe ſeas, and how he came there is by no means material. The converſation of the officers and crew, ſuppoſing it to have been correctly repreſented by this man, is not to be depended on, for they may have been ignorant as to what were the real inſtructions to the ſuperior officer; and it is quite impoſſible that the Court ſhould take it from his underſtanding of their converſation. It is upon mere converſation, too, that he founds his belief that captain *Porter* had no authority from his Government to commiſſion this ſhip; for he ſays, " that upon captain " *Porter*'s charging him with piracy in having cap- " tured an *American* veſſel when his letter of marque " was not againſt the United States, this appearer " told him, that what he had himſelf done was much " more irregular, for that he had armed and ſent this " veſſel, the *Georgiana*, cruiſing, without having any " authority from his Government to do ſo; and that " the ſaid captain *Porter*, in reply, did not ſay, or " pretend, that he had any ſuch authority; but merely " ſaid that the officer he had put on board the ſaid " veſſel was a commiſſioned officer." I think that I am not at liberty to conſider this affidavit as any part of the evidence before the Court, and ſhall therefore diſmiſs it entirely from my conſideration.

Then how ſtands the caſe upon the original evidence? The veſſel, it appears, was captured by an

American

The GEORGIANA. April 26th, 1814.

American frigate, and a number of men and guns were put on board, under a commiſſioned officer, who was directed to cruize againſt *Britiſh* veſſels; which he accordingly did, and ſucceeded in making three captures. The veſſel, therefore, was engaged in actual hoſtilities.

The queſtion is, whether, under the words of the prize act, this ſhip is ſufficiently "ſet forth for war," ſo as to entitle the captors to condemnation of her as prize of war, according to the original law of recapture, and alſo according to the clauſe of the ſtatute excepting veſſels which have been "ſet forth for "war," from the more modern uſage of reſtitution upon ſalvage.

It has been uſual for the Court to look in the firſt place for the commiſſion of war, becauſe where that is to be found, nothing more is wanted. Where the ſhip has been armed without any authority, That has not of itſelf been held ſufficient to bring the caſe within the exception of the clauſe; for the Court has never gone ſo far, as to ſay that a mere arming will do, notwithſtanding the marginal note to the prize act, which "ſeems to make uſing as a ſhip of war" ſufficient. The Court has always required that there ſhould be ſome ſemblance of authority, although it has not thought it neceſſary, in the caſes which have been brought before it, to look very minutely into the foundation of that authority. If ſailors were merely to put arms on board a veſſel, and go out upon a cruize, I think there would be a deficiency of authority, and that the veſſel could not be conſidered as "ſet forth for war," according to the true conſtruction of the act of parliament. But where there is a fair ſemblance of authority, and nothing upon the face of the proceedings to invalidate it, *that*

The GEORGIANA.

April 26th, 1814.

the Court has been in the habit of conſidering ſufficient. In the caſe of the *Caſtor*, before the Lords of Appeal, (1795), the authority of the commander of a fleet was conſidered as ſufficient, though the veſſel was not carried into port or adjudged. And in the caſe of the *Ceylon*, (ſupra 105), this Court held ,that the employment of a ſhip for the purpoſes of war, under the authority of the Governor of the *Mauritius*, was ſufficient to conſtitute it a public ſhip of war. But it is ſaid that this caſe goes farther—that here was no authority from the commander of a fleet, but the mere act of an individual officer commanding a ſingle frigate. Take it to be as ſtated, that it is the act of an officer commanding one ſhip only, the diſtinction does not appear to me to be very material. When it has been held, that the commander of two or three ſhips may ſufficiently "ſet forth for war," it is not going much farther to ſay that the commander of a ſingle ſhip may poſſeſs the ſame authority. There is nothing in the evidence to ſhew that there were not other veſſels under the command of this very officer; but, taking it to be otherwiſe, the diſtinction, as I have already ſaid, does not appear to me to be material. A great deal has been ſaid with reſpect to the inconvenience that might ariſe to the commercial intereſts of this country, if the commanders of ſingle frigates ſhould be allowed to commiſſion all the prizes they may happen to take. The argument *ab inconvenienti* may be very ſtrong when applied to caſes otherwiſe doubtful; but it is not to be intended that the law would introduce any inconvenience. No particular inconvenience has been pointed out, and I confeſs it does not occur to me how any could ariſe. It certainly would not occaſion a greater number of captures by the enemy, for they may be as

The GEORGIANA.

April 26th, 1814.

eaſily made without as with a commiſſion; and if the *American* law be the ſame as our own, the only queſtion would be, whether the prize ſhould be condemned to the individual captor, or to the *American* Government; the deciſion of which queſtion, in either way, could afford but little conſolation to the *Britiſh* owner. There does not appear to me to be ſuch an eſſential and ſolid diſtinction between this and the two other caſes, as ſhould induce me to apply a different rule. The ſhip was ſupplied with additional arms, and was employed in cruiſing againſt *Britiſh* veſſels, ſome of which ſhe actually ſucceeded in capturing—*Non conſtat* that ſhe was not ſo employed under ſufficient authority. I ſhall therefore condemn this veſſel as prize to the re-captors.

N. B. The ſhip and cargo were in the firſt inſtance carried to the *Bermudas*, and afterwards ſent on to *London* with the conſent of the parties, and under the ſanction of the Court. Freight was on a ſubſequent day (20th *July*) decreed to the re-captors for the voyage from the *Bermudas* to this country.

May 18, 1814.

DILIGENTIA, Moller.

If one party takes a veſſel and afterwards abandons her, and then another takes the ſame veſſel, the the laſt ſeizor is in law the only captor; and the act of a commander in relinquiſhing that which would otherwiſe have been good prize to himſelf and his crew is binding upon the intereſts of all under him.

THIS *Daniſh* veſſel, with various others of the ſame nation, was lying in the river *Tagus*, in the month of *Auguſt* 1808, and was there blockaded by a fleet of His Majeſty's ſhips, under the command of Vice-Admiral Sir *Charles Cotton*. Upon the evacuation of *Portugal* by the *French* forces, in virtue of the convention of *Cintra*, this and the other *Daniſh* veſſels in the *Portugueſe* ports were taken poſſeſſion of by the ſquadron under the command of Sir *C. Cotton*, but were releaſed by orders from him before his return to *England*. Upon the arrival of Admiral *Berkeley*, by whom Sir *C. Cotton* was ſucceeded, in *January* 1809, the veſſels were again ſeized, and ſent to *England*, in conſequence of an order iſſued by the Lords Commiſſioners of the Admiralty to ſend home for legal adjudication all *Daniſh* and other foreign veſſels then in the *Tagus*, which were in that river prior to the evacuation of *Portugal* by the *French*. The ſhip was originally condemned as taken by a ſquadron of His Majeſty's ſhips under the command of Admiral *Berkeley*; but an appearance having been afterwards given for Sir *C. Cotton* and his fleet as the actual captors, the decree of condemnation was reſcinded, in order that the claim of Sir *C. Cotton* might be propounded. The queſtion was, whether the fleet of Sir *C. Cotton* or that of Admiral *Berkeley* were entitled as the captors to the benefit of the prize.

Judgment.

Sir *W. Scott*.—This is a queſtion affecting property of much greater value than that which ſtands for the immediate

The DILIGENTIA. May 18th, 1814.

immediate deciſion of the Court, and reſpects the intereſts of two highly meritorious officers, to both of whom the Court would be deſirous of giving a ſhare of the benefit; but it ſo happens that their intereſts are in perfect oppoſition to each other. As it is impoſſible, therefore, that the claims ſhould co-exiſt, the Court is bound to decide upon them according to their legal merits, which muſt depend upon this queſtion, which of them was the actual captor? that is, not only which is the perſon by whom a ſeizure was made, but which is the party legally entitled to the character of captor; for there may be many ſucceſſive captors, but only one can be legally entitled as captor to the benefit of prize. If one party takes a veſſel, and afterwards abandons her, and then another takes the ſame veſſel, the laſt ſeizor is in law the only captor. To this it muſt be added, that the act of the commander is binding upon the intereſts of all under him, and that he alone is reſponſible for coſts and damages. He has a right to examine the ſhip's papers, and to detain or not, according to his own notions of propriety. He may, perhaps, act erroneouſly, and relinquiſh what would have been good prize to himſelf and his crew. But if he does diſmiſs what he had before ſeized upon, the intereſt of himſelf and all under him is concluded by his act, and the ſame veſſel lies open to ſeizure by any other captor who may exerciſe a ſounder diſcretion. Subject to theſe principles, I have to examine the facts of this caſe.

The cauſe was proceeded in originally by Admiral *Berkeley* and his fleet, but an excluſive intereſt was afterwards ſet up by Sir *Charles Cotton* and his fleet, on the ground of an anterior ſeizure. The evidence comes before the Court in a manner not very favour-

The DILIGENTIA.

May 18th, 1814.

able to the claim which has thus been ſet up by Sir *C. Cotton*; the preparatory examinations being totally ſilent as to any other ſeizure except that made by Admiral *Berkeley*. The allegation which had been given in, propounding the intereſt of Sir *Charles Cotton*, ſtates, "that in purſuance of the definitive convention "entered into for the evacuation of the kingdom of "*Portugal* by the *French* army, and which definitive "convention was ratified by the ſaid Sir *Charles Cot-*"*ton*, as the commander in chief of His Majeſty's "ſhips and veſſels on the coaſt of *Portugal*, the *French* "army, then in the poſſeſſion of *Liſbon* and other "places in *Portugal*, did, within the time allowed and "agreed upon by the ſaid convention, evacuate the "ſaid country; and thereupon the ſaid ſhip the *Dili-*"*gentia*, then lying in the river *Tagus*, and other "*Daniſh* and foreign veſſels then lying in that and "other rivers and ports of *Portugal*, and which had "been ſo as aforeſaid blockaded by the ſaid fleet, were, "in purſuance and obedience to the orders and direc-"tions of the ſaid Sir *Charles Cotton*, *ſeized and taken* "*as prize* by the ſhips and veſſels compoſing the ſaid "fleet under his command, or ſome of them." And for proof of the facts here ſtated, reference has been made to the anſwers of Admiral *Berkeley*, who admits generally that he believes the article to be true; and terms ſomewhat ſimilar are uſed by the witneſſes upon their depoſitions. They ſpeak very much to the ſame effect, and it is, I think, to be taken as proved that a ſort of a ſeizure was made. The allegation further pleads, "that in order more effectually "to keep poſſeſſion of and ſecure the ſaid ſhip *Dili-*"*gertia*, a prize-maſter and ſeveral men, from on "board one of His Majeſty's frigates belonging to the

"ſaid

" ſaid fleet, were, on or about the 3d of *September* " 1808, put on board the ſaid ſhip; and ſuch prize-" maſter then took poſſeſſion of the papers belonging " to the ſaid ſhip, and took out part of the crew " thereof, and took ſuch other meaſures as were ne-" ceſſary for ſecuring the ſaid prize to the ſaid fleet." Now I muſt certainly underſtand this as pointing to a continuation of poſſeſſion under the ſeizure pleaded in the former article. To this part of the allegation, the gentlemen who have ably conducted this cauſe, have not ventured to read the anſwer of Admiral *Berkeley*; nor is there any evidence whatever to prove the continuance of poſſeſſion by Sir *C. Cotton*, though it is in reality the main fact in the cauſe; for the only queſtion is, whether there was a continued poſſeſſion by the fleet of Sir *C. Cotton* or not. If the poſſeſſion was not continued, then the claim made on their behalf falls to the ground: it becomes at once a caſe of common capture made and relinquiſhed, and thus left open to the rights of any other captor who might chooſe to take poſſeſſion at a ſubſequent time. A ſeizure was certainly made by Sir *Charles Cotton*'s fleet, but whether by way of prize, or for what other purpoſe, does not exactly appear. It might be for the ſake of deliberation only, or for anſwering events which might occur under the extraordinary circumſtances attending the evacuation of *Portugal*. It is left perfectly equivocal on the evidence, whether the ſeizure was made in the way of prize or not. It appears that the *Daniſh* flags were left flying when Admiral *Berkeley* came to *Liſbon*, and that the ſhips were under the control of the *Daniſh* maſters and their crews. They were very much *ſui juris*, and though ſome acts were done which looked like an intention of employing them as exigencies might

The DILIGENTIA.

May 18th, 1814.

might require—for the purpoſe of removing the inhabitants and their property, in caſe the enemy ſhould return, yet there was nothing to ſhew an intention of proceeding againſt them as prize. It ſeems to have been the perſuaſion of Sir *C. Cotton*'s mind, that the ſhips were protected under the convention, and that, acting upon a delicacy of that kind, he forbore to treat them as enemy's property. He would ſcarcely have left them in a ſtate in which they were left, if he had thought that they were liable to be treated as prize. It appears that one of the veſſels under ſimilar circumſtances was actually ſold by her owners; but this, it is ſaid, was done without the knowledge of Sir *Charles Cotton:* others eſcaped, and went out of port without his having heard of their departure. I cannot, without ſome reflection on his conduct, ſuppoſe that he would have been negligent enough to have permitted theſe acts to have taken place, if he had conſidered the veſſels as prize of war. The intention, probably, was to employ them in conveying away *Portugueſe* ſubjects: but this will not ſhew that they were conſidered as prize. Under the trepidation and alarm which at that time exiſted in *Portugal*, any veſſel of any country might have been warrantably ſeized for ſuch a purpoſe; and there would have been no ſcruple with reſpect to the ſeizure of any veſſel of any nation at that time in an emergency of that kind. Then, it is ſaid, that the being in the port, was in itſelf a poſſeſſion; but how were they detained in the port? certainly not by any reſtriction of Sir *Charles Cotton*'s. Some of them, it appears, were ſold; another of them took a cargo on board, and ſailed without any obſtruction from the *Britiſh* Admiral. Thoſe that remained were not detained by any force impoſed by Sir *C. Cotton.* They might perhaps have remained there through

The DILIGENTIA. — May 18th, 1814.

through fear of capture at ſea, perhaps from an erroneous interpretation of the convention, ſuch as Sir *C. Cotton* himſelf appears to have laboured under. I think all the evidence as to what paſſed afterwards ſhews clearly that they did not conſider themſelves as detained. The maſters remonſtrate againſt the ſeizure made by Admiral *Berkeley*—plead the authority of Sir *C. Cotton* for their liberty—aſſert their perfect right of protection, under the convention, and under the conduct obſerved by Sir *C. Cotton*: They maintain that the ſeizure made by Admiral *Berkeley* was in direct contradiction to the conduct of his predeceſſor. Nothing can be clearer than that they were free from all apprehenſions that their ſhips were detained in order to be ſent to *England* for adjudication. Sir *C. Cotton* having abandoned poſſeſſion, makes no ſubſequent ſeizure, but comes to *England*, having previouſly given orders to reſtore the flags and ſhip's papers to ſome of the veſſels; and it is clear that he directed the reſtitution under a decided interpretation, which he had taken upon himſelf to make, of the convention. In his letter he ſays, "It "appearing, by a communication from the *Daniſh* "deputy-conſul at *St. Ubes*, that the colours and papers "of the veſſels of that nation there are in your poſſeſ- "ſion, I deſire you will forthwith return to the maſters "of the ſaid veſſels their reſpective colours and papers, "and withdraw any men that may have been placed "on board them from His Majeſty's ſhip under your "command, leaving them to act agreeably to the "ſtipulation of the treaty, of which an extract is en- "cloſed herewith for your information." It is true that this order is confined to the ſhips lying at *St. Ubes*; but it is not to be ſuppoſed that they were treated more favourably than thoſe which were lying at *Liſbon*,

or

The DILIGENTIA.

May 18th, 1814.

or elſewhere in *Portugal*. I muſt preſume that the papers and colours belonging to the *Daniſh* ſhips in the *Tagus* were not taken at all, or, if taken at firſt, were afterwards reſtored. Sir *C. Cotton's* poſſeſſion being thus abandoned, and the mere remaining in port not being what the Court has held to be perſonal poſſeſſion, on what ground can the claim reſt? If ever Sir *C. Cotton* had entertained views of prize, he had abandoned them, and this abandonment is concluſive againſt himſelf and all under his command.

I come now to conſider the acts of Admiral *Berkeley*; and theſe, it has been ſaid, are to be interpreted altogether by the order iſſued from the Admiralty. I cannot agree to that propoſition to the extent in point of effect in which it has been ſtated. If the Admiralty iſſued an order for the capture of a particular ſhip, that will not affect the intereſt of the captor in the prize which he may make. The order of the Admiralty would juſtify the ſeizure ſo far at leaſt as to indemnify the captor from coſts and damages, but it would not affect any beneficial intereſt that he might derive from the capture. The title of the captor would be preciſely the ſame, whether he was acting upon his own diſcretion, or in obedience to the orders of the Admiraty. Whatever information the Admiralty might have had, or whatever might be their notion of the fact or of the law, with reſpect to any intereſt to be derived from the capture, would not in the leaſt alter the caſe. The queſtion is, whether the acts done by Admiral *Berkeley* would give him an intereſt; for ſuppoſe the Admiralty ſhould think Admiral *Berkeley* not entitled, *That* would not influence the deciſion of the queſtion before the proper tribunal. But has not the Court reaſon to ſuppoſe that the Admiralty were left very much in the dark as to the real

ſtate

The DILIGENTIA.

May 18th, 1814.

ſtate of things? It appears, I think, from the documents before the Court, that matters were not very accurately repreſented to them. It is obſervable that in the letter from the Secretary of the Lords Commiſſioners of the Admiralty to Admiral *Berkeley*, which mentions their having taken the opinion of the King's Advocate, no mention is made of the convention of *Cintra*. The letter is in theſe terms: "My Lords Com-
" miſſioners of the Admiralty having required the
" opinion of the King's Advocate, whether *Daniſh* and
" other foreign ſhips now in the *Tagus*, which were
" in that river prior to the evacuation of *Portugal* by the
" *French*, could be conſidered as prize, and ſent to *Eng-*
" *land* for adjudication, or whether they are to be
" conſidered as taking the benefit of a neutral port;
" I am commanded to tranſmit to you a copy of the
" opinion of the King's Advocate on the queſtion, and
" to ſignify their Lordſhips direction to you to ſend to
" *England* for legal adjudication any ſhips now in the
" *Tagus*, which may come within the above deſcrip-
" tion." I cannot attribute to this order any other effect than as guaranteeing Admiral *Berkeley* in ſending home the ſhips for adjudication, and in juſtifying him in doing whatever was neceſſary for that purpoſe; the Board of Admiralty being perhaps at the time of iſſuing this order in ſome degree of ignorance whether poſſeſſion had been given up, or not, and thinking perhaps that an order was neceſſary for their ſeizure, if they had been abandoned. In this ſtate of things, Admiral *Berkeley* finds theſe veſſels denuded of all protection under the convention, which Sir *C. Cotton* appears to have thought them entitled to, but which this Court has decided otherwiſe, and from which deciſion there has been no appeal. The ſhips, however

The DILIGENTIA. *May* 18th, 1814.

ever, were ſtill entitled to the general protection of a neutral port; and it would have been hazardous for Admiral *Berkeley* to have ſeized without orders, and ſent away theſe veſſels, ſubject as they undoubtedly muſt have been, to a *Portugueſe* territorial claim. If he had ventured to have ſeized them without orders, he muſt have taken the conſequences of his own act. Now it is an eſtabliſhed rule of law, that a claim of neutrality of territory can be made by the neutral government only; and it appears that the Government of *Portugal* did make ſuch a claim, though it was afterwards withdrawn, upon a ſtrong repreſentation made by the Government of this country as to the hoſtile diſpoſition ſhewn by *Denmark* to the general cauſe of *Europe*, and, as I believe, particularly on account of the reſiſtance made by the *Danes* to the return of the *Spaniſh* troops under *Romana* to the *Peninſula*. It was not thought decorous for *Portugal*, relieved as ſhe was by this country from the preſence and oppreſſion of the enemy, to perſiſt in ſuch a claim; and it was accordingly withdrawn upon the remonſtrance being made.—Theſe ſhips then are not entitled to the protection of the convention, nor to that ariſing from a neutral territory; for the claim which was made upon that ground has ſince been withdrawn. The ſhips themſelves were in the poſſeſſion of the *Daniſh* maſters, and the papers in the hands of their own *Daniſh* conſul. They were ſeized, it is ſaid, *pro formâ*, for the purpoſe of ejecting the *Daniſh* maſters, and liberating them from the reſponſibility which lay on them, whilſt they continued in poſſeſſion. The expreſſions of Admiral *Berkeley*, in the letter ſent to *Kennedy*, the agent of Sir *C. Cotton*, as agent of the captor, are ſufficiently explained by the fact of entire ignorance of Admiral

The DILIGENTIA.

May 18th, 1814.

Berkeley, at that time that the poſſeſſion of Sir *C. Cotton* had been withdrawn. It would be very awkward, in point of form, if the Court were to condemn theſe ſhips as prize to Sir *C. Cotton*, when the depoſitions of the witneſſes aſcribe the ſeizure to Admiral *Berkeley* only; and the anſwers which admit an original ſeizure by Sir *C. Cotton*, do not admit a continuance of poſſeſſion in him.—In the abſence then of all evidence as to a continued poſſeſſion under the firſt ſeizure, it would, I ſay, be extremely awkward in point of form to condemn to Sir *C. Cotton*; but not in point of form only, but likewiſe of law and ſubſtantial juſtice; for I think there is evidence to ſhew that Sir *C. Cotton*, from motives of delicacy, and a nice interpretation of the convention, thought theſe veſſels were not liable to be conſidered as prize, and either by miſtake of fact or law, relinquiſhed poſſeſſion, and by ſo doing abandoned the right of himſelf and of thoſe under him. I muſt, therefore, pronounce for the excluſive intereſt of Admiral *Berkeley*; but I direct the expences of Sir *C. Cotton*'s claim to be paid out of the proceeds.

May 20th, 1814.

BLENDEN-HALL, Barr.

Salvors in poſſeſſion of a ſhip have a legal intereſt which cannot be diveſted without adjudication in a competent Court, and it is not for the King's officers or any other perſons on the ground of ſuperior authority to diſpoſſeſs them without cauſe. Thoſe who claim as ſalvors and diſpoſſeſs others who were acting as ſuch, muſt ſhew an apparent if not an actual neceſſity for their interference.

THIS *Britiſh* veſſel ſailed from *Portſmouth* on the 27th of *November* 1813, with a cargo of naval ſtores, bound for the *Bermudas*, and proceeded on her voyage under convoy of His Majeſty's ſhip *Severn* till the 2d of *December*, when ſhe ſeparated, in conſequence of tempeſtuous weather, which continued until the 5th of the ſame month, and occaſioned great damage to her hull and rigging. In the afternoon of that day ſhe was boarded and taken poſſeſſion of by the *French* frigate *La Clorinde*, the commander of which took out the maſter and crew, and ordered the veſſel to be ſcuttled. On the 12th of *December* ſhe was diſcovered in a derelict ſtate by the poſt-office packet *Eliza*, in latitude 42° 30′ N. and 11° 20′ W. and was at firſt ſuppoſed to be a ſhip of war; but, upon diſcovery of her real character, the commander of the packet and ten of his men went on board, and found that ſhe was left without a crew, and had ſuſtained conſiderable damage. As there was no compaſs on board, the boat was ſent back to fetch one from the packet; and having returned therewith, at 5 P. M., the ſhip made ſail towards *Falmouth*, in company with the *Eliza*, the commander of that veſſel remaining with his men on board the *Blenden-Hall*. Strong gales and ſtormy weather coming on, they loſt ſight of the packet, and ſearch was then made for a chart and log-glaſs, but to no purpoſe. They continued, however, to ſteer the ſame courſe E. by N. the weather being ſtill tempeſtuous till the 14th of *December*, when it became calm, and about noon on the following day, the ſhip was found to be in latitude

47°

The BLENDEN-HALL.

May 20th, 1814.

47° 34′ N. On the 16th, they perceived a ſhip and a brig on the lee bow, and having hoiſted colours, union downwards, in the mizen rigging, as a ſignal of diſtreſs, they hove-to for the purpoſe of ſpeaking, and then requeſted to be accommodated with a chart, a log-glaſs, and a watch. A lieutenant from the brig, which proved to be the *Challenger*, came on board, to whom the maſter gave an account of his wants. The lieutenant replied, that he had better write a note to the captain of the *Challenger* for the articles he ſtood in need of, which the maſter immediately complied with, and made an offer to pay for the ſame by an order upon Mr. *Slade* of *Plymouth*. The lieutenant then went to the *Challenger*, and reported to his commander, that the officer in poſſeſſion of the *Blenden-Hall* had no commiſſion, and that both he and his crew were probably *Americans*. He then returned to the *Blenden-Hall*, and demanded to ſee the commiſſion; but this having been left on board the packet, could not be produced. The officer, however, exhibited the uniform-buttons, which he wore, as the commander of a poſt-office packet, and gave every explanation in his power. A maſter's mate and nine men from the *Challenger* were then ſent on board, to conduct the veſſel into *Plymouth*, where ſhe arrived on the 18th of *December*. The ſhip and cargo were valued at about £72,000, and the queſtion was, whether the poſt-office packet the *Eliza* was to be conſidered the ſole ſalvor, or jointly with H. M. brig the *Challenger*. There was alſo a farther queſtion as to the amount of ſalvage.

JUDGMENT.

Sir *W. Scott*.—This is a queſtion concerning the right to ſalvage for the preſervation of a ſhip and cargo of

The BLENDENHALL.

May 20th, 1814.

of very conſiderable value, found derelict at ſea, the ſhip itſelf being the property of *Britiſh* merchants, and the cargo conſiſting of ſtores belonging to His Majeſty's Government. The veſſel was brought into the port of *Plymouth* by a lieutenant and ſome men, part of the crew of H. M. ſloop the *Challenger*; and a claim has been given for the commander, officers, and crew of that ſhip as joint ſalvors, there being other claimants already before the Court. The ſhip had been found in a ſtate of derelict by others, in whoſe poſſeſſion ſhe was at the time when the *Challenger* came up, and who were conducting her towards the Channel, in the chops of which they had arrived when the *Challenger* came up, and diſpoſſeſſed them. Under theſe circumſtances, it was certainly incumbent on the commander of the *Challenger* to bring forward his claim in proper form, and to take care that it ſhould be properly ſubſtantiated.—His own intereſt called upon him to ſhew, at leaſt by affidavit from himſelf, what was done under his authority, and otherwiſe to ſuſtain his claim by due proof. He had alſo to vindicate his conduct in diſpoſſeſſing the original ſalvors; becauſe it is moſt undoubtedly the duty of thoſe who claim as ſalvors, and diſpoſſeſs others who were acting as ſuch, to ſhew, if not an actual, at leaſt an apparent, neceſſity for their intruſion, and to offer ſome excuſe that may fairly juſtify their interference in that with which they had otherwiſe no manner of buſineſs. Thoſe who have obtained poſſeſſion of a ſhip as ſalvors have a legal intereſt, which cannot be diveſted before adjudication takes place in a court poſſeſſed of competent authority; and it is not for the King's officers, or any other perſons, on the ground of ſuperior authority, to diſpoſſeſs them without cauſe. Caſes may certainly exiſt in which

The BLENDEN-HALL.

May 20th, 1814.

which the interference of the King's officers may be not only juſtifiable, but even laudable. They may find perſons in poſſeſſion who are unfit, from inexperience, to be truſted with valuable property, or who have been guilty of groſs miſconduct, which may render their removal proper and neceſſary. But theſe neceſſities muſt be made apparent to the Court; and perſons taking poſſeſſion, and bringing in a ſhip under ſuch circumſtances, muſt underſtand that it is their duty, in the firſt place, to juſtify themſelves for the ſteps they have taken. It is rather extraordinary, therefore, that no evidence of this kind was obtained from the officer who commanded the *Challenger*, during his ſtay in this country, and it is ſtill more extraordinary that the Court ſhould now be aſked to put off the cauſe till ſuch evidence can be procured from him in *America*, whither he is ſince gone. Application is now made for leave to do that which ought to have been done *in limine*. It was the duty of that officer not only to have ſupported his claim, but to juſtify his own conduct in diſpoſſeſſing the orignal ſalvors. He was in port, and had an opportunity of doing it; but he has not thought proper to avail himſelf of it. I cannot put off this cauſe any longer, to allow him a ſtill farther opportunity; neither can I aſſent to the doctrine which has been laid down by the counſel, that the owners have nothing to do with this queſtion. The Court is aſked to give a larger ſum, on account of the greater number of ſalvors; the owners, therefore, are materially intereſted in reſiſting the additional claim which has been ſet up. The merchants ought not to be charged with a higher rate of ſalvage, on account of the unneceſſary interference of the ſecond ſalvors. The original ſalvors are likewiſe intereſted in reſiſting

The BLENDENHALL.

May 20th, 1814.

this claim, for it muſt operate as a diſcouragement to ſalvors to be liable to be turned adrift and baffled by an oppoſition of this kind. I have no heſitation, therefore, in confirming the doctrine I have over and over again laid down, that perſons diſpoſſeſſing original ſalvors without reaſonable cauſe ſhall receive no benefit from the ſervices they may afterwards perform, but the whole reward ſhall go to thoſe who have been wrongfully diſpoſſeſſed. Thoſe who are wrong-doers ſhall take no advantage from their own wrong. The exertions they may uſe in bringing in the ſhip ſhall enure not to their own profit, but to the profit of thoſe who would otherwiſe have performed the ſervice. Under theſe principles the Court is to conſider whether any ſuch neceſſity is ſhewn,—I do not ſay any abſolute neceſſity, but ſuch as, under all the circumſtances, and the impreſſion they were calculated to make, would juſtify the interference on the part of the *Challenger*.

This ſhip was found derelict by a poſt-office packet, and was taken poſſeſſion of by the maſter and ten of his men. The men compoſing the crew of this deſcription of veſſel, it is well known, are uſually very expert ſeamen; it is therefore to be preſumed that they were as competent as any perſons could be to navigate this or any other veſſel. They cleared the ſhip of water, and ſet it to rights in other reſpects, and conducted her in ſafety for a conſiderable diſtance, ſteering a direct courſe for a *Britiſh* port, towards which they had very far advanced. The weather was extremely moderate; but it appears that, from the hurry in which they quitted their own ſhip, they had not provided themſelves with two or three neceſſary implements—a log-glaſs, a watch, and a chart of the Channel, and that no ſuch articles were to found

on

The BLENDENHALL. May 20th, 1814.

on board the derelict ſhip. Of theſe things they were in want, and upon that account, and *that only*, a ſignal of diſtreſs was hoiſted. When the boat from the King's ſhip was ſent, in conſequence of the ſignal of diſtreſs, what was the repreſentation made? Not that they were in diſtreſs, but merely that they were in want of the articles which I have juſt enumerated, and that they were willing to pay for them by an order upon *Plymouth*; and I muſt ſay that, I think, the accommodation they requeſted was reaſonable, and ought to have been granted. It would not have been a very extravagant or heroic act of duty on the part of the King's ſhip, to have afforded this accommodation, and to have complied with the demand which was made, eſpecially as there was public property on board. It appears that they had ſteered a right courſe even without the aſſiſtance to be derived from inſtruments of this deſcription, and had actually taken an obſervation on the day before. A paper, containing a liſt of the articles required, was given to the Lieutenant of the *Challenger* on his coming on board, but not a hint was given of any other want.—Nothing to make it neceſſary to put a ſingle man on board. The Lieutenant, on his return to his own ſhip, reported that Mr. *Stevens*, the maſter of the packet, had not any commiſſion; but I do not perceive on what authority he made this report. He was ſent back to aſcertain whether Mr. *Stevens* had a commiſſion or not. Then how could he have taken upon himſelf to report, in the firſt place, that he had not any? Suppoſe Mr. *Stevens* had no papers on board this ſhip to ſhew that he was commander of the packet, no great ſuſpicion could have ariſen from that circumſtance; for he would naturally

The BLENDENHALL. May 20th, 1814.

leave all his papers on board his packet. The Lieutenant reported that he thought it probable that Captain *Stevens* and his men were *Americans*, and upon this the act of diſpoſſeſſing them has been attempted to be juſtified. Could an idea be reaſonably entertained that theſe men were *Americans?* No caſe has preſented itſelf to the notice of this Court, of *Americans* pretending to belong to a King's packet. Would they have been hanging out ſignals of diſtreſs to a *Britiſh* ſhip of war, if they had really been *Americans?* Would they, if *Americans*, have ſteered for the coaſt of *England*, as theſe men were doing? Would *Americans* have offered payment by means of an agent at *Plymouth*, mentioning his name and other particulars? There was alſo the dreſs of the commander of the packet, with the uniform-button, and other inſignia, by which the commanders of *Britiſh* packets are diſtinguiſhed, which were ſhewn to the Lieutenant. Theſe circumſtances, I think, ought not have left a reaſonable doubt as to the national character of theſe perſons. There were eleven men on board, of whoſe ſkill there could be no doubt. It is well known that the moſt expert ſeamen are employed on board the King's packets; there could not therefore be a neceſſity for farther aſſiſtance of men.—And if no neceſſity be ſhewn, then it is a diſpoſſeſſion not warranted by law, and the parties are not entitled to any reward for the ſervices they may have performed. The act of the King's ſhip does not appear to have been produced by a neceſſity which would juſtify her interference, and therefore ſhe has no claim to ſhare as joint captor.

The claim of ſome paſſengers on board the *Eliza* to ſhare as ſalvors was alſo rejected.

Counſel

The Blenden-hall.

May 20th, 1814.

Counſel were then heard on the merits of the caſe as to the ſalvage-ſervice rendered by the packet and her crew, the firſt ſalvors.

Judgment reſumed.

This very valuable property has been preſerved and reſtored to the owners,—the ſhip to a *Britiſh* merchant,—and the cargo to His Majeſty's Government; and the queſtion is, what compenſation is due to the perſons by whom the property has been ſaved. It is unneceſſary for me to ſtate the principles upon which the Court is in the habit of deciding queſtions of this kind. Caſes of ſalvage are frequently various and complex in their circumſtances, and the Court is obliged to find its way as well as it can upon conſideration of the facts of each particular caſe; it is certainly ſatisfactory to the mind of the Court when parties ſtate what they themſelves are willing to give; when they make their own eſtimate, not to limit the diſcretion of the Court, but to direct its judgment according to the benefit the parties ſuppoſe themſelves to have received. In fixing a proportion of the value, the Court is in the habit of giving a ſmaller proportion where the property is large and a higher proportion where the value is ſmall; and for this obvious reaſon, that in property of ſmall value, a ſmall proportion would not hold out a ſufficient encouragement; whereas in caſes of conſiderable value, a ſmaller proportion would afford no inadequate compenſation. In caſes of derelict, the Court not unfrequently gives one-half of the property ſaved; and this perhaps was done in all caſes of the ſame kind according to the old law.

It is not to be denied that very conſiderable ſervice has been performed in the preſervation of this ſhip and cargo; for, without looking to the minute though ingenious

The BLENDENHALL.

May 20th, 1814.

ingenious obſervations made by the counſel upon the evidence, it muſt be admitted, generally, that the ſhip and cargo were left in a ſituation of great peril, having been abandoned by the enemy in a tempeſtuous ſeaſon of the year in the *Bay of Biſcay*, where ſhe had encountered a great deal of bad weather.—That all the crew were taken out, and the veſſel ordered to be ſcuttled, which, in the opinion of the maſter, was actually done. She was thus left ſubject to be again captured by the enemy, or to be driven about at the mercy of the winds and waves. Is it to be ſaid that this is not a ſituation of extreme peril? Certainly not. Upon the firſt diſcovery of this ſhip, ſhe appeared to thoſe on board the packet to be a veſſel of war: preparations for action were made in caſe ſhe ſhould prove to be an enemy's veſſel of that deſcription, and the parties were ready to encounter the danger of an engagement. She was then boarded and taken poſſeſſion of; and every thing was done that was neceſſary for the preſervation of the ſhip and cargo. Though deſtitute of the proper inſtruments, the ſhip was conducted towards the coaſt of *England*, and was afterwards brought into port in ſafety. Theſe circumſtances afford a caſe of very conſiderable merit on the part of the original ſalvors; for I muſt attribute to them the ſervices performed by the others. The ſituation of the ſalvors too was not wholly deſtitute of danger, though I do not ſay it was of a very formidable kind. The condition of the ſhip, the want of proper inſtruments, and the danger of capture by the enemy, to whom no reſiſtance could by poſſibility have been made, are all circumſtances not unworthy of attention. The ſhip and cargo have been brought in and reſtored, and I muſt ſuppoſe that both the Government and the *Britiſh* owner would be inclined

The BLENDENHALL. May 20th, 1814.

clined to give a liberal remuneration to thoſe who have been the means of preſerving their property. The value of the ſhip and cargo appears to be ſomewhere about £72,000. Unaſſiſted in my judgment by any offer on the one ſide, or demand on the other, I think I ſhall not be guilty of injuſtice to any of the parties by giving a tenth to the ſalvors, which I accordingly decree to be paid: and to prevent any minute and troubleſome enquiries into the value of the property, I ſhall eſtimate the ſhare of the ſalvors at the ſum of £7,000. The expences of the ſalvors muſt alſo be paid.

ARTHUR, RATHBONE. June 21ſt, 1814.

THIS was the caſe of an *American* ſhip and cargo, captured in the *Eems*, on the 26th *December* 1809, by His Majeſty's gun brig *Blazer*, for a breach of the blockade of that river impoſed by the order in council of the 26th of *April* 1809. Proceedings were inſtituted on behalf of the *Blazer* on the 29th of *January* 1810; and on the 16th of *February* in the ſame year a proctor exhibited for the commander of His Majeſty's ſchooner *Paz*, and alleged him to be a joint-captor. On the 23d of *February* the Court condemned the veſſel and cargo *generally*, reſerving the queſtion by whom taken, and this ſentence was afterwards affirmed by the Lords Commiſſioners of Appeal. On the 1ſt of *Auguſt* 1811, the intereſt of the *Paz* was denied, and the caſe now came before the Court upon the queſtion whether that ſhip was entitled to ſhare in the prize as a joint-captor.

The blockade impoſed by the order in council of the 26th *April* 1809, was never intended to be maintained in the regular mode of enforcing blockades by ſtationing a number of ſhips round the mouth of the blockaded port, and was ſometimes maintained by a ſingle ſhip.

The ARTHUR.

June 21st, 1814.

For the claim, the Advocate of the Admiralty and *Lushington*.—The claim of the *Paz* to share in the prize is founded upon two grounds; first, upon that of being engaged in a common enterprize—the blockade of the river *Eems*; and, secondly, upon the ground of being in sight at the time of capture. In the answers of the commander of the *Blazer*, it is admitted that, from the month of *July* 1809, he had received orders from Lord *George Stuart*, the senior officer at *Heligoland*; and it appears by the depositions of the witnesses, that, on the 21st of *December*, an order was given by the same officer to the commander of the *Paz* to proceed to the *Eems*, and to take effectual measures for blockading that river. The *Blazer* was already engaged in maintaining this blockade. The two vessels were, therefore, employed as associates in the same service under the orders of the same commanding officer; for though the order given by Lord *George Stuart* does not in terms direct the *Paz* to associate itself with the *Blazer*, yet in substance it does; for it directs that ship to take a part in the same service in which the other was already engaged. To constitute an association between two ships, nothing more is necessary than that they should act together for the same purpose, under the orders of the same superior authority, and such was the case in the present instance. The capture also appears to have grown out of the common purpose for which they were associated; for the ship was seized for an alleged breach of the blockade of the *Eems*, and has since been condemned for that offence. See the case of the *Forsigheid*, *Willesden*, (*Edw.* 124.) and of the *Nordstern*, (*Lords*, 18th *July* 1809.)

With respect to the fact of sight at the time of capture, that, as well as previous chasing, is spoken to by the

The ARTHUR.

June 21st, 1814.

the releaſing witneſs; and although a claim of joint-capture cannot *generally* be ſupported by the teſtimony of releaſing witneſſes only, yet, under the peculiar circumſtances of this caſe, the intereſt of the *Paz* not having been denied till long after the crew of the prize had left this country, ſuch teſtimony ought, from the impoſſibility of now procuring other evidence, to be admitted as ſufficient. The commander of the *Paz* was left to ſhare all the reſponſibility ariſing from the aſſertion of his right as joint-captor, throughout the proceedings in this Court and the Court of Appeal, without the leaſt ſuſpicion that his intereſt would be eventually denied; and it would be a harſh meaſure to turn round upon him at this late period, and require the production of witneſſes who have long ſince returned to *America*.

For the actual captor, the King's Advocate and *Bur-naby* argued to the effect of the obſervations contained in the judgment of the Court.

JUDGMENT.

Sir *W. Scott*.—This is a claim made by one of His Majeſty's ſhips to ſhare as joint-captor in a prize taken in the river *Eems* by another ſhip belonging to His Majeſty, for a breach of the blockade impoſed by the order in council of the 26th of *April* 1809. This order was, amongſt others, iſſued in the way of retaliation for the meaſures which had been previouſly adopted by the *French* Government againſt the commerce of this country. The blockade impoſed by it is applicable to a very great extent of coaſt, and was never intended to be maintained according to the uſual and regular mode of enforcing blockades, by ſtationing a number of ſhips, and forming as it were an arch of circumvallation round the

The ARTHUR.

June 21ſt, 1814.

the mouth of the prohibited port. There, if the arch fails in any one part, the blockade itſelf fails altogether; but this ſpecies of blockade, which has ariſen out of the violent and unjuſt conduct of the enemy, was maintained by a ſhip ſtationed any where in the neighbourhood of the coaſt, or, as in this caſe, in the river itſelf, obſerving and preventing every veſſel that might endeavour to effect a paſſage up or down the river. Though the principle of aſſociation had not been of late favoured either here or in the Court of Appeal, the Court certainly held, in the caſe which has been mentioned (*Forſigheid*), that where ſhips are acting together for the maintenance of the ſame blockade, there is, in the nature of ſuch an aſſociation, an identity of ſervice that forms a juſt foundation for joint-intereſt in prizes taken for the violation of the blockade; becauſe it could not be ſupported without unity of operation. The connexion between ſhips ſo employed is of ſo intimate a nature, that they may be conſidered as forming links of the ſame chain. But the ſame conſideration is not applicable to this ſpecies of blockade, which, as I have obſerved, was ſometimes maintained by a ſingle ſhip. There no ſuch circumvallation is neceſſary; and although a number of different ſhips may be engaged in maintaining the blockade, yet they are not ſo connected and continued as to form one maſs of obſtruction to the communication which may be attempted to be carried on with the prohibited port. It does not appear what were the orders given by the commanding officer to the actual captor; but I ſuppoſe they were the ſame as thoſe given to the ſhip claiming to be a joint-captor—" to maintain the blockade of " the *Eems*, and to protect the trade to and from *Heli-*
" *goland*."

" *goland.*" No mention is made of any other veſſel in theſe orders; but the officer is left to maintain the blockade according to his own ſkill and judgment. It appears that this *American* ſhip had come into the river, and was taken poſſeſſion of by the *Blazer* there ſtationed; and it does ſo happen that another veſſel, the aſſerted joint-captor, had received from Lord *George Stuart*, the commander in chief on that ſtation, an order to this effect: " 'Tis my directions you proceed im-" mediately, in His Majeſty's ſchooner, under your " command, to the river *Eems*, and take the moſt " effectual means your judgment may point out to you " for blockading the ſaid river, and affording pro-" tection to the trade to and from *Heligoland*; at which " ſervice you will remain till you are relieved by His " Majeſty's gun brig *Exertion*, or receive further " orders from me." Not a word is here ſaid of any other veſſel employed upon the ſame ſervice; no mention is made of any connexion with the *Blazer*, the actual captor; nothing in the nature of an aſſociated ſervice is adverted to; but Lieutenant *Pring* is to maintain the blockade according to his own diſcretion, and without reference to the directions of any ſenior officer.

If the order iſſued by Lord *George Stuart* does not conſtitute a privity of ſervice, much leſs do the acts done in obedience to it eſtabliſh any aſſociation between the two ſhips. The prize had entered the river before the aſſerted joint-captor had come upon the ſtation: The breach of blockade had been committed before the arrival of the *Paz*, conſequently there could be no breach of any blockade which that veſſel maintained or aſſiſted in maintaining.

It

The ARTHUR.

June 21st, 1814.

It is pleaded that the *Paz* was in ſight at the time of capture, but there are none but releaſing witneſſes who ſpeak to this fact; and it is an eſtabliſhed rule of this Court, that fight cannot be ſufficiently proved by releaſing witneſſes only. The witneſſes who were examined in preparatory, directly negative the fact of fight. They ſay that there were ſome merchant veſſels, but no ſhip of war, in ſight at the time of capture. The caſe then ſtands upon the evidence of the releaſing witneſſes only; and I am under the neceſſity of holding that to be inſufficient. With reſpect to fight, then, there is a failure of proof, as well as upon the other ground, that of aſſociation. There was no privity between the two veſſels, no ſyſtematic conjunct mode of acting, as in the caſe of the *Forſigheid*. I am of opinion that there is a total failure of proof, both as to ſight and aſſociation, and I therefore pronounce againſt the claim.

GALEN, Rogers.

July 19th, 1814.

JUDGMENT.

SIR *W. Scott.*—This is a cafe in which a reference has been made by the Privy Council to the judgment of this Court, to decide as in a matter of prize, though ſtrictly ſpeaking it is not ſo to be conſidered, the captors not being entitled to any benefit in their own right, but deriving their title altogether from the bounty of the Crown. The allegation ſtates, "That "on the 11th of *Auguſt* 1812, His Majeſty's ſhips "*Creſſy*, &c. &c. under the command of *Charles* "*Dudley Pater* Eſq. were about eight or nine miles "to the weſtward of *Dar's Head*, at the eaſtern en- "trance of the *Great Belt*, with a number of mer- "chant ſhips, which were proceeding under their "convoy up the *Baltic*, the wind being then at north- "weſt, with light airs and fine weather; and at the "ſame time His Majeſty's ſhips *Courageux*, &c. &c. "under the command of *Philip Wilkinſon* Eſquire, "together with a fleet of merchant ſhips under their "convoy, bound to *England*, were at anchor in the "*Great Belt*, between the *Trendelin* and the iſland of "*Femeren*, about eight or nine miles to the weſtward "of the *Creſſy*'s convoy; the ſaid convoys being then "diſtinctly in ſight of each other." Theſe officers, therefore, were bound in oppoſite directions, but had duties of the ſame kind to perform. Now the firſt and great object of the attention of an officer appointed to a ſervice of this kind is, the care of his convoy: He is not at liberty to deſert it for the purpoſe of acquiring

A convoying ſhip may make a prize as well as any other of His Majeſty's Ships, provided the capture can be effected without deſerting the care of the convoy; and there is no more objection in the caſe of a convoying ſhip to conſtructive than to actual capture.

The GALEN.

July 19th, 1814.

any advantage to himſelf, nor is he to volunteer any attack upon the enemy, if it takes him away from his firſt great duty. But, *as far as is conſiſtent with that duty*, he may purſue his own intereſt, and may attack and annoy the enemy in any way that may appear to him to be advantageous. He may capture the ſhips and goods of the enemy, provided he does not withdraw himſelf from the duty of protecting the veſſels placed under his care, and may take the benefit of the prizes which he may have the good fortune to make. There is no pretence for ſaying that a convoying ſhip may not legally and effectually make a prize, as well as any other of His Majeſty's ſhips; nor is there more objection in the caſe of a convoying ſhip to conſtructive than to actual capture. A convoying ſhip is no more diſabled from rendering aſſiſtance to others, than from making an actual capture herſelf. The ſervice on which ſhe is employed forms no diſqualification in either caſe, ſuppoſing only that the capture can be effected without any breach of the principal duty—the care of the convoy. The allegation goes on to plead, that, "about three o'clock in the afternoon of the "ſaid day, His Majeſty's ſhip *Pyramus*, *Charles Daſh-* "*wood* Eſq. commander, arrived off *Dar's Head*, "from *Hawke Roads*, and communicated to the ſaid "*Charles Dudley Pater* Eſq. the order iſſued by the "Lords Commiſſioners of Admiralty, for the deten- "tion of *American* ſhips and cargoes not furniſhed "with *Britiſh* licences; and alſo a general order or "memorandum from Admiral Sir *James Saumarez*, "the *Britiſh* commander in chief in the *Baltic*, to the "commanders of His Majeſty's ſhips and veſſels, to "carry the ſaid order into effect." It was the duty, therefore, of Captain *Pater* to intercept all *American*

veſſels, whether under convoy or not, provided he could do ſo without neglecting the veſſels placed under his care. The allegation goes on to ſtate, that, " in " purſuance thereof, the ſaid *Charles Dudley Pater* " Eſq., immediately brought-to the convoy under his " charge, and proceeded to examine the papers of " ſeveral *American* ſhips therein; and finding one of " ſaid ſhips, called the *Navigator*, not protected by " any licence, he took poſſeſſion thereof; and, about " four o'clock, the wind ſhifting to the north-north- " eaſt, and very light, the whole of the ſaid convoy " anchored."

The next article begins by ſtating, that Captain *Pater* " well knew that there were, amongſt the con- " voy under the orders of the ſaid *Philip Wilkinſon* " Eſq. then at anchor in ſight, a number of *American* " ſhips." And it has been aſked how he could poſ- ſibly know that Captain *Wilkinſon* had any ſuch ſhips in his convoy? It is by no means neceſſary that the Court ſhould enter upon an enquiry with reſpect to the manner in which he might have acquired ſuch in- formation. The circumſtance in itſelf is not improba- ble; and, as the fact is averred, it muſt for the preſent be taken as true. The article goes on to plead, that Captain *Pater*, " about four o'clock in the afternoon " of the ſaid day, cauſed a telegraphic preparatory " ſignal to be hoiſted on board the *Creſſy*, to the " *Courageux*, then within ſignal-diſtance, in order to " attract her attention, and the ſaid ſignal was kept " flying until after five o'clock; that ſhortly after ſix, " the ſame evening, a telegraphic ſignal was made by " the ſaid ſhip *Courageux* to the ſaid ſhip *Creſſy*, en- " quiring—*Have you any news?* which ſignal was " repeated by His Majeſty's ſhips *Mars*, *Ethalion*,

" *Pyramus*,

The
GALEN.

July 19th, 1814.

" *Pyramus*, *Steady*, and other ſhips of both convoys;
" and to which the following reply was immediately
" given by the *Creſſy*: *Orders to detain all Ameri-*
" *cans—have detained one, for which all ſhare*;
" which reply being in like manner repeated by the
" *Pyramus* and *Steady*, and other ſhips, an anſwer was
" received from the *Courageux*, that the ſaid ſignal was
" underſtood." I ſee nothing improper in this,—quite the contrary. Captain *Pater* certainly did right in communicating the intelligence as ſoon as poſſible, that there might be no delay in effecting the capture of the *American* ſhips; and, if the ſeizure was made whilſt he remained in ſight, he would undoubtedly be entitled to ſhare. The allegation further pleads, " that
" ſoon after ſuch ſignal was made, communicating the
" ſaid orders, the boats of His Majeſty's ſhip *Mars*
" were hoiſted out, manned and armed, and ſent away,
" for the purpoſe of carrying the ſaid orders into
" effect, by boarding and detaining the *American* ſhips
" in the ſaid convoy." It ſhould ſeem, therefore, according to the account here given, that Captain *Wilkinſon* acted, in the firſt inſtance, exactly as Captain *Pater* had done; that he uſed prompt endeavours for carrying the order for the detention of *American* ſhips into execution. It is pleaded, that this " might eaſily
" have been done, the weather being fine, and all the
" ſaid convoy then at anchor; but, by order from the
" ſaid *Philip Wilkinſon* Eſq., the boats were re-called,
" and hoiſted in; and the capture and detention of
" the *American* ſhips in the ſaid convoy was *purpoſely*
" poſtponed until the following day." This part of the article, it is argued, ought to be altogether rejected as unneceſſary, and as tending to produce unpleaſant irritation. And I think it would be ſufficient to

aver

The GALEN.

July 19th, 1814.

aver the fact of poſtponement generally, without ſtating that it was done purpoſely to deprive Captain *Pater* of his ſhare in the prizes. It will, without the inſertion of this offenſive charge, ſufficiently appear that Captain *Wilkinſon* acted at firſt as if he meant to make an immediate capture, and that he had it in his power ſo to do; but that, for ſome reaſon or other, he changed his intention, and deferred for a time the carrying his purpoſe into execution. The circumſtance of Captain *Wilkinſon* having poſtponed the capture, appears very proper to be pleaded; but I do not think it is material to the intereſts of the other party that the reaſon for this delay ſhould be aſſigned. If it be ſhewn that Captain *Pater* would have been entitled to ſhare, provided the ſeizure had been made at the time when it might have been, and when, according to the prompt mode of proceeding uſually adopted on ſuch occaſions, it ought to have been made, that will be ſufficient for the ſupport of his intereſt. Captain *Pater*, it is ſtated in the third article of the allegation, offered his aſſiſtance in ſecuring the *American* ſhips; but this, it has been ſaid, is of no conſequence, becauſe his aſſiſtance was unneceſſary.—So it is in very many caſes of joint-capture, and, indeed, in almoſt all caſes in which merchant veſſels are taken by ſhips of war. The offer made by Captain *Pater* ſhews, however, an intention on his part to afford aſſiſtance, and a ſtrong impreſſion upon his mind that he had it in his power ſo to do. The next article pleads, "that, "during the ſucceeding night, both convoys conti- "nued at anchor in the ſame ſituation." And, if ſo, they muſt have had in it their power to communicate with each other by ſignal or otherwiſe, and to afford

The GALEN.

July 19th, 1814.

mutual aſſiſtance, without deſerting their reſpective convoys. This circumſtance, of remaining at anchor ſo very near to each other, does, I think, take the caſe out of the authority of the principles that have been adverted to, and materially diſtinguiſhes it from thoſe caſes in which ſhips have been ſailing in different directions, wholly unconſcious, perhaps, of what has been going on. The article goes on to plead, that they ſo continued at anchor "until the following morn-" ing, about half paſt five, when the ſaid convoy, " under the command of the *Courageux*, being ob-" ſerved getting under weigh, the ſaid *Charles Dudley* " *Pater* Eſquire cauſed the following communication " to be made, by telegraphic ſignals, from the *Creſſy* " to the *Courageux—We have detained an American* " *for your convoy—do you want any aſſiſtance from us?* " To which a reply was immediately received—*Send* " *her.* Which ſignals were repeated by the *Mars*, " *Pyramus*, *Helder*, *Bellete*, and other ſhips of war " of both convoys. And the *Pyramus* then parting " from the *Courageux*'s convoy, to proceed towards " that of the *Creſſy*, the ſaid *Philip Wilkinſon* Eſquire " ſent, by the commander of the *Pyramus*, a letter to " Captain *Pater*, ſtating that, as he was unwilling to " loſe ſo fine a breeze, he was making a run, without " taking poſſeſſion of any *Americans*, and that the " ſharing in them muſt reſt with the Privy Council;" as it undoubtedly muſt do, for the whole benefit which any of the parties can take does not belong to them in their own right, but flows entirely from the bounty of the Crown. In a ſubſequent part of the allegation, it is pleaded, that the convoy, under the protection of the *Courageux*, again caſt anchor within ſight of the

Creſſy

The GALEN.

July 19th, 1814.

Creſſy and the other ſhips of Captain *Pater*'s convoy, and that they were in ſight when the captures were actually effected. There can be no doubt, therefore, that, if the facts ſhould be proved, Captain *Pater* and his fleet would be entitled to ſhare; for there is nothing in the convoying character which would deprive him of his right, more than it would the actual captor; the duty of attending to the ſhips under their convoy being equally incumbent on both. Captain *Pater* had a knowledge of the exiſtence of hoſtilities, which he communicated to the other, and actually made him an offer of aſſiſtance, when the motion towards capture was made, though afterwards delayed on whatever ground. There was, alſo ſuppoſing the ſtatement here made to be correct, ſight, both at the time when the capture might firſt have been made, and afterwards, when it actually was made. I have no doubt, therefore, of admitting this allegation to proof, the alteration which has been ſuggeſted being firſt made.

LA CLORINDE, Le Garde.

July 1814.
1814.

Head-money is due to the capturing ſhip whether the ſurrender has been produced by actual combat or not, but it is never granted unleſs the act of capture or of deſtruction is conſummated.

THIS was a claim on the part of the *Eurotas* to the head-money due on account of the capture of the *French* frigate *Clorinde*, excluſively of His Majeſty's frigate the *Dryad*, which claimed as actual taker.—The circumſtances in favour of the claim of the *Eurotas* were pleaded in an allegation, which was oppoſed on the part of the *Dryad*.

The allegation ſtated in ſubſtance, that the *Eurotas* brought the *Clorinde* to action on the evening of the 25th of *February*; that it continued nearly two hours, when the *Clorinde* had loſt her main-maſt, mizen-maſt, and fore-top-maſt, and being much wounded in her hull, and having loſt many men, ſtood off from the *Eurotas*; that the *Eurotas* likewiſe had loſt all her maſts, and was not able to keep within gun-ſhot, but kept within ſight all night; that ſhe repaired herſelf by jury courſes, &c. and by noon the next day was ready for action, and in chaſe of the *Clorinde*, and not more than ſix or ſeven miles diſtant at half paſt twelve, when two ſtrange ſails hove in ſight; after laying too for ſome time to aſcertain what they were, finding they were *Britiſh* ſhips of war, the *Dryad* and *Achates*, ſhe reſumed her chace; that theſe two ſhips made ſail towards the *Clorinde*, and the *Dryad* came up with her at half paſt twelve, the *Eurotas* being diſtant only four miles, and came up at twenty minutes after one, when they found the *Clorinde* already in poſſeſſion of the *Dryad* and *Achates*; that the *Clorinde* was ſo diſabled by her engagement with the *Eurotas* that ſhe was incapable of renewing the engagement; her guns being all diſabled, and the ſhip unmanageable, and the crew panic ſtruck, and ſkulking and refuſing to fight, notwithſtanding

The CLORINDE. July 18th, 1814.

notwithstanding the threats and even force employed by her officers, and determined not to resist the *Eurotas* which was nearing her next morning, and on her approach expected to take possession without further defence; that no resistance was made to the *Dryad*, whose officers and crew considered her as prize to the *Eurotas*, which alone engaged her, and was prevented from taking first possession only by the superior sailing of the *Dryad*.

The King's Advocate and *Burnaby*, of counsel for the *Dryad*, contended that this representation was directly opposed by that which was given by the *French* witnesses already examined, whose disinterested testimony was conclusive upon the facts. These witnesses, the Captain and two officers deposed, "that they fell "in with the *Eurotas* on the afternoon of the 25th of "*February*; that in the action the *Eurotas* having lost "all her masts, and the *Clorinde* her mizen-mast "and her fore-mast wounded, they were separated; "that between nine and ten the next morning two "other ships of war hove in sight, and about one "o'clock, after a few shots from the *Dryad*, the *Clo-* "*rinde* struck her colours to her, as further resistance "would be vain." The two ships had therefore separated, each of them in a state of incapacity. It was not the single act of the *Clorinde* steering off from a victorious enemy as here represented. The *Eurotas* had determined, if she could, to renew the engagement with effect, but whether that was practicable remained uncertain. They had fought pretty nearly *æquo marte*, and what might have been the result of a renewed contest it is impossible to say. It is clear from this allegation itself that the *French* officers did not consider it as a decided matter, for it is pleaded that they employed persuasion and threats, and even force to induce

The CLORINDE.

July 18th, 1814.

them to renew it, which they would hardly have done if all reſiſtance to the *Eurotas* had been deſperate. When the *Dryad* came up, a freſh ſhip, after a chace of ſeveral hours, the reſiſtance became really hopeleſs, and they ſtruck to her after the firing of a few ſhots; but againſt a ſhip which they had combated before on nearly equal terms, and which they muſt know to be in a ſtate of conſiderable infirmity, the conduct of the *Clorinde* and the iſſue of the conflict might have been different. (*Alerte*, 6 *Robinſon* 238; *La Gloire*, *Edw.* 280.)

Jenner and *Phillimore*, for the *Eurotas*, argued, that the caſe preſented itſelf to the Court under circumſtances which diſtinguiſhed it from the caſes cited on the other ſide; that the *Eurotas* alone was actually engaged with the prize, and conſequently could alone be entitled to that which, in maritime courts, had always been conſidered as the peculiar and appropriate reward of actual combat; that, if the letter of the Prize Act gave the head-money to the actual taker, the ſpirit and meaning of the ſtatute gave it to thoſe only who ſuſtained the engagement. How, otherwiſe, could we underſtand the expreſſions of its being given for as many of the enemy "as were alive at the beginning of the engagement?" It was the ancient practice to give head-money to thoſe only who were engaged. Before the firſt prize act, in Queen *Anne's* reign, gun-money, as it was then called, was only given "for ſhips of war taken in fight." In the caſes of the *Superb*, 1710, *Thouloufe*, 1715, and the *Dange*, 1761, head-money was pronounced to be due to thoſe only who were actually engaged with the captured ſhips. What was the idea which would go forth to the navy, if the Court were to decree the bounty to the *Dryad*? The ſailors conſidered head-money as the peculiar reward of fighting,

as that which the Government of the country held out to them as a reward for the loſs of limbs and the riſk of life. The *Dryad* and the *Achates* were certainly entitled to ſhare in the hull of the prize, and any cargo ſhe might have on board. The emoluments of the victory, whatever they might be, were open to them; but let the head-money, the trophy of it, be to thoſe only who had fought and bled to obtain it.

JUDGMENT.

Sir *W. Scott*.—If the Court were at liberty to conſult merely its own inclination, there are circumſtances that might diſpoſe it to decide this caſe in favour of the *Eurotas*; for ſhe had certainly done moſt, and ſuffered moſt in this tranſaction; but the Court is bound to follow where the authority of decided caſes leads it, and muſt adhere to that which, by a ſeries of deciſions, has become the fixed rule of law.

The ſubject of head-money has undergone ſome variations. It is true, as ſtated by Dr. *Phillimore*, that originally it was the reward of actual combat only: In later times the neceſſity of actual combat has been diſpenſed with, and capture itſelf, whether produced by actual combat or not, has been held a ſufficient foundation for the claim. But there is no caſe in which head-money has been granted, where the act of capture has not been conſummated. There may have been great demonſtrations of valour, but if they have not ended in the actual ſurrender of the enemy they have not that I know of been held ſufficient. In all caſes a ſucceſsful conſummation of the engagement is required; and if it does happen that other veſſels come in at a later hour, all that the Court can do, is to confirm the capture as one common act, and, looking to its commencement, its progreſs, and its final accom-

The CLORINDE.

July 18th, 1814.

pliſhment, to hold that all parties are entitled. It cannot weigh minutely the different proportions of merit: They may be, as in this inſtance, ſignal and marked, or they may be ſuch as no exactneſs of attention could conveniently diſtinguiſh. It is poſſible to ſuppoſe an extreme caſe in which the whole conflict had been ſuſtained by one veſſel, and the poſſeſſion taken by another which caſually came up. It may ſeem hard in ſuch a caſe that one veſſel ſhould run away with any portion of the fruits of another's victory. But I fear that if no indication of ſurrender had been made, and the victor was in ſuch a ſtate as to be unable to compel it, and to take poſſeſſion, a deciſion could not eaſily be found that would authorize the Court to exclude the veſſel that conſummated the capture. What was the caſe in the preſent inſtance?

As to the gallantry diſplayed in the firſt engagement, and the luſtre which the Captain of the *Eurotas* threw around his own character by his conduct in it, there is no doubt: but the queſtion is, Whether the conſummation of the act was not interrupted and defeated by intervening events. It is admitted that the *Eurotas* had all her maſts ſhot away on the evening of the 25th; that the ſhips ſeparated without a ſurrender on either ſide, and that the *Eurotas* was ſo crippled as to be unable to keep within gun-ſhot; a deciſive proof of her being at that time in an unmanageable ſtate. It is pleaded that by noon the next day ſhe was ready for action, and was coming up faſt ſo as to be quite near at 20 minutes paſt one. But what had happened in the interval? It is proved by the *French* witneſſes that the *Dryad* and another veſſel of war hove in ſight of the *Clorinde* between nine and ten, and commenced a chace and came up, and after firing ſome ſhot at her took poſſeſſion between twelve and one; the *Eurotas* being then diſtant,

The CLORINDE.

July 18th, 1814.

according to her own ſtatement four miles. She deſcribes herſelf to have been all that morning *in chaſe*, conſequently not *in poſſeſſion*; the very phraſe of *in chaſe* admits the want of poſſeſſion. All that is aſſerted reſpecting the inability of the *Clorinde* to reſiſt capture by the *Eurotas*, if ſhe had come up in time, is contradicted in ſome degree by what is aſſerted in the very ſame plea, that the *French* officers were employing perſuaſions and threats, and even force, to induce their men to reſiſt; manifeſtly upon the opinion entertained by them that the conteſt which they had maintained upon pretty equal terms the day before might have been renewed without deſpair of ſucceſs. But the fact is, that whatever might have been the event if the *Eurotas* had come up, ſhe never did come up till after the *Dryad* had compelled the ſurrender; and this at the diſtance of many hours after the ceſſation of the conteſt on the evening before between the *Clorinde* and the *Eurotas*. The *Dryad* therefore is the actual captor, though probably acquiring that character with more facility in conſequence of that conteſt. As actual captor, the *Dryad* commences and carries on proceedings; as ſuch ſhe is recognized by the Court in the judgment with the conſent of the *Eurotas*. To ſay that that conſent was given under an underſtanding that her title to head-money was ſtill to be diſputed, is unintelligible; for the character of actual captor carries with it, of courſe, a title to head-money. If that title was intended to be diſputed, the character of actual captor ought to have been claimed by the *Eurotas* herſelf, alledging that the act of poſſeſſion by the *Dryad* was merely formal and did not legally amount to an actual taking.

Upon theſe grounds, I reject this allegation claiming the head-money for the *Eurotas* excluſively, but pronounce for her intereſt in conjunction with that of the *Dryad*,

The CLORINDE.

July 18th, 1814.

Dryad, in as much as by her conflict immediately preceding ſhe is entitled to be conſidered as a joint taker, and I do not underſtand that the *Dryad* oppoſes it.

July 20th, 1814.

L'ELISE, OR LOUISE.

THIS was a claim for head-money on behalf of His Majeſty's ſhip *Diana*, which had attacked a *French* frigate and driven it on ſhore on the coaſt of *France*; and attempted afterwards to deſtroy her by fire but without ſucceſs. She was, however, left in ſo diſabled a ſtate that the enemy were under the neceſſity of breaking her up.

The King's Advocate ſtated the circumſtances of the caſe, and moved the Court to decree head-money to be due.

Court.—Neither the ſhip, guns, nor men, have been acquired to this country, or loſt to the enemy. Under ſuch circumſtances, I am not aware that the Court has in any caſe pronounced head-money to be due.

The King's Advocate ſtated, that the Court had in other caſes given head-money where a ſhip of the enemy had been ſet on fire and left.

Court.—There the preſumption muſt have been that a complete deſtruction took place. Let the caſe ſtand over for further enquiry.

On a ſubſequent day the claim was rejected.*

---

* The circumſtances of the caſe were detailed in an affidavit made by the commander of the *Britiſh* ſhip, of which the following is a copy:

Perſonally appeared, *Thomas Rowe* Eſq. captain of His Majeſty's frigate *Diana*, and ſolemnly made oath, and ſaid as follows: That being at ſea on board His ſaid Majeſty's frigate, and cruizing off

FANNY, LAWTON.

July 20th, 1814.

Salvage is due for the recapture of neutral goods previouſly taken by the enemy on board a *Britiſh armed* ſhip.

THIS was a queſtion of ſalvage upon neutral (*Portugueſe*) property, on board a *Britiſh* armed ſhip, which had been taken by an *American* ſchooner, and was afterwards retaken by one of His Majeſty's ſhips of war. The veſſel ſailed on her outward voyage under convoy with a cargo from *Liverpool* to *Rio de Janeiro*, where the maſter increaſed his crew by hiring thirty

---

off Cape *La Havre* on the coaſt of *France*, on or about the 16th day of *November* 1810, the ſaid Appearant fell in with the *French* frigate *Eliſe*, and chaſed her into *La Hogue*, and the next day the wind blowing freſh with a lee tide, the *Diana* was obliged to anchor to prevent her falling further to leeward, and the day following the tide being favourable and the wind more moderate, the *Diana* got under weigh and worked up to the enemy's frigate, and engaged her for a conſiderable time, which, with the batteries on ſhore, returned the fire, by which one man on board the *Diana* was wounded, and her maſts, rigging, and hull much cut; and finding that ſhe was within a reef, and the ebb tide making ſtrong, was prevented renewing the action, but continued cruizing and anchoring occaſionally in ſuch a poſition as near to the enemy's frigate as poſſible, in order to render impracticable any attempt of aſſiſtance or eſcape by day, and watching her with her boats by night, until the 23d *December*, when the ſaid *French* frigate in attempting to get under weigh ran on ſhore, but the wind blowing very hard he was prevented doing any thing to annoy her, until the following day, when the *Diana*, was got under weigh, and in company with His Majeſty's frigate *Cayenne* ſtood in towards the ſaid frigate, but finding that there was not water enough for the *Diana* to get within gun-ſhot, the *Cayenne* drawing leſs water, ſtood in to engage her, to prevent her being lightened, and in the evening two brigs of war, and three armed luggers, were obſerved to anchor alongſide the frigate for the purpoſe of taking out the crew; the water being up to her main deck, and the tide ſtill flowing, it was thought

The FANNY.

July 20th, 1814.

thirty additional men, for the purpoſe of fighting his way home without the protection of convoy, which he had obtained permiſſion to do from the *Britiſh* Admiral commanding on that ſtation. The ſhip was furniſhed with

---

thought practicable to ſet her on fire at high water, which ſervice was undertaken by the Deponent in the barge, with an eight oared cutter and gig, with two caſks of combuſtibles, and at 8 o'clock he ſucceeded in getting on board the frigate, although the brigs and luggers were ſo near her, that he could hear the people talking on board, and as ſoon as the fire was lit, opened a heavy fire with the batteries of round and grape-ſhot: That the ſaid frigate continued burning from 8 o'clock till 12 when it came on to blow very freſh, which obliged the Deponent to get under weigh, and the wind encreaſing to a gale, he was driven into *Portſmouth*, but he has ſince aſcertained that in conſequence of the damage the ſaid frigate ſuſtained from the fire, and being driven on ſhore, ſhe was obliged to be broke up and was therefore totally loſt to the *French* ſervice. And the ſaid Appearant further made oath, that by reaſon of the enemy having made their eſcape in conſequence of the attack as before mentioned, it was not poſſible to ſecure any part of the crew as priſoners of war; but ſhe being a frigate of the largeſt claſs, and with a vaſt number of men on board her, he truly and verily believes that the number of men actually alive and on board the ſaid *French* frigate, *Eliſe*, at the commencement of the aforeſaid engagement and attack thereupon, muſt, from her evident force, ſize, and appearance, have amounted in all to at leaſt 500 men, and that he is the more induced to entertain ſuch belief, opinion, and judgment from his having ſince underſtood that three *French* national frigates called *L'Indefatigable*, *La Minerve*, and *L'Armide*, having been captured and carried into the port of *Plymouth*, the firſt mounting 44 guns, and manned with 640 men, the ſecond mounting 42 guns, and manned with 609 men, and the third mounting 44 guns, and manned with 590 men, to either of which ſhips of war, the ſaid Appearant is truly and firmly convinced that the enemy's ſaid frigate *Eliſe*, ſo wrecked and deſtroyed by the attack and continued operations of the aforeſaid *Britiſh* ſquadron as herein-before ſet forth, was at leaſt fully and completely equal, if not ſuperior to, in every point and circumſtance of ſize, force, and naval equipment.

To

The FANNY.

July 20th, 1814.

with a letter of marque, had ſixteen guns mounted, with ſmall-arms and ammunition in proportion. On her return-voyage, with a cargo, conſiſting partly of *Portugueſe* and partly of *Britiſh* property, ſhe was captured on the 17th of *April* 1814, by the *American* ſchooner *General Armſtrong*, but did not ſurrender till after a very ſevere action, in which the mate was killed, and ſeveral of the ſeamen, and the merchant himſelf, who happened to be on board was dangerouſly wounded. The ſhip and cargo were recaptured on the 10th of *May* 1814, by His Majeſty's ſhip *Sceptre*, and, for this ſervice, a ſalvage was demanded upon the *Portugueſe*, as well as the *Britiſh* property. The demand for ſalvage was reſiſted on the part of the *Portugueſe* owners.

To the Right Honourable Sir *William Scott* Knight, Lieutenant Judge or Preſident of His Majeſty's High Court of Admiralty of *England*,

The humble petition of *Charles Biſhop* Eſq. His Majeſty's Procurator General.

Sheweth,

That on or about the 24th day of *December* 1810, His Majeſty's frigates *Diana* and *Cayenne*, attacked and ſucceeded in ſetting fire to, and deſtroying a *French* frigate called *L'Eliſe*, which had been chaſed into *La Hogue* by His Majeſty's ſaid frigate *Diana*; having been ſo deſtroyed, hath not therefore been proceeded againſt for condemnation as lawful prize, and the evidence required by the Honourable Commiſſioners of His Majeſty's Navy cannot be produced to aſcertain that ſhe was a veſſel of war, and the number of men belonging to her at the time of her being ſet fire to as aforeſaid. Your petitioner has therefore hereunto annexed an original affidavit of *Thomas Rowe* Eſq. late lieutenant and now commander of His Majeſty's ſaid frigate *Diana*; and prays that you will be pleaſed to admit the ſame as evidence and pronounce according thereto. That the ſaid veſſel *L'Eliſe* was a veſſel of war belonging to the *French* Government, and had alive and on board, at the commencement of the attack 500 men.

For

The FANNY.

July 20th, 1814.

For the recaptors, the King's Advocate and *Jenner* contended that ſalvage was due for the recapture of all property that would have been in danger of condemnation in the enemy's courts of prize; that goods taken on board an armed *Britiſh* ſhip would have been in danger of confiſcation, if carried to *America*; and, conſequently, that ſalvage was due for the recapture that had been effected. That merchants putting their goods on board a veſſel armed for defence, muſt be ſuppoſed to intend taking advantage of that defence; that, by ſo doing, they quitted the protection of their own neutral character, and relied upon that of hoſtile force, and muſt take the conſequences of an unſucceſsful engagement: that it was a reſiſtance to viſitation and ſearch, as much as if they had ſailed under convoy: that the *American* courts gave ſalvage upon the recapture of neutral property on board armed ſhips. *Talbot v.* the ſhip *Amelia*, *Dallas's American Reports*, vol. 4. 34. *Acteon*, *Edward's Rep.*

Adams and *Stoddart*, *contra*, argued that if the proof here was ſufficient to ſhew that the property was *Portugueſe*, the ſame proof would have been ſufficient in *America*. That neutral property is not generally liable to ſalvage, and that the onus of making out the exception to the general rule is on the party ſetting up the claim. That the caſe cited was that of a neutral armed ſhip, which materially diſtinguiſhed it from the preſent caſe.

JUDGMENT.

Sir *W. Scott.*—This ſhip, having a commiſſion for war, but employed likewiſe for purpoſes of commerce, ſailed under the protection of a *Britiſh* convoy, from *Liverpool* to *Rio de Janeiro*, and there obtained permiſſion

The FANNY.

July 20th, 1814.

miſſion from the Admiral on the ſtation to return home without convoy. Thirty men were hired, and ſome additional guns were put on board, for the expreſs purpoſe of enabling the ſhip to fight her way home; and it was upon the proſpect of her being competent to defend herſelf that the Admiral permitted her to ſail without convoy. The fact of her being armed muſt have been notorious at *Rio de Janeiro*, and conſequently within the knowledge of the merchants who put their goods on board. It appears, that the ſhip actually ſuſtained an engagement, for the witneſs ſays, that "ſhe did not ſurrender till after a very ſevere action "of fifty-five minutes, during which many guns were "fired on both ſides, and the ſhip had her ſecond "mate killed, four men dangerouſly wounded, as "was alſo the merchant himſelf, who happened to be "on board, and her ſtanding, and running-rigging "all cut to pieces; ſo that they had no longer any "command of the ſhip." Being ſo taken by the *Americans*, and afterwards retaken by His Majeſty's ſhip *Sceptre*, the queſtion is, Whether the *Portugueſe* lader is entitled to the reſtitution of his goods abſolutely, or ſubject to the payment of a ſalvage to the recaptors. Now, upon principle, I cannot but think that the goods would have been in very great danger of condemnation in an *American* court of prize. Reference has been made to an act of the *American* congreſs relative to ſalvage, but I do not think that it can have much bearing on the preſent caſe. The act does not define the caſes to which it is intended to be applied—that is left to the Courts to determine at their diſcretion. I ſhall therefore lay the *American* law entirely out of my conſideration, and conſider the caſe upon the general principle. Is there a high degree of probability

The FANNY.

July 20th, 1814.

bability (for certainty is not required) that this property would have been condemned, if it had been carried into an *American* port? In every point of view in which I can ſee the matter, I cannot help thinking that it would have run a very conſiderable riſque of condemnation; and that the *Portugueſe* merchant would have no very good ground of complaint if it had actually been condemned. The ſhip being furniſhed with a letter of marque, is manifeſtly a ſhip of war, and is not otherwiſe to be conſidered, becauſe ſhe acted alſo in a commercial capacity. The mercantile character being ſuperadded, does not predominate over or take away the other. There was formerly, indeed a diſtinction made between privateers and merchant-veſſels furniſhed with a letter of marque, the one being entitled to head-money and the other not; but that diſtinction has ſince been entirely done away. A neutral ſubject is at liberty to put his goods on board a merchant-veſſel, though belonging to a belligerent, ſubject, nevertheleſs, to the rights of the enemy who may capture the veſſel; but who has no right according to the modern practice of civilized ſtates, to condemn the neutral property. Neither will the goods of the neutral be ſubject to condemnation, although a reſcue ſhould be attempted by the crew of the captured veſſel, for that is an event which the merchant could not have foreſeen. But, if he puts his goods on board a ſhip of force, which he has every reaſon to preſume will be defended againſt the enemy by that force, the caſe then becomes very different. He betrays an intention to reſiſt viſitation and ſearch, which he could not do by putting them on board a mere merchant veſſel, and ſo far as he does this he adheres to the belligerent; he withdraws himſelf from his protection of neutrality,

and

The FANNY.

July 20th, 1814.

and reſorts to another mode of defence; and I take it to be quite clear, that, if a party acts in aſſociation with a hoſtile force, and relies upon that force for protection, he is, *pro hâc vice*, to be conſidered as an enemy. It is not a ſufficient excuſe to ſay, that the *Portugueſe* are not poſſeſſed of ſhipping of their own, ſufficient for the whole of their commerce, and are therefore under the neceſſity of making uſe of thoſe belonging to others. If they chooſe to take the protection of a hoſtile force inſtead of their own neutral character, they muſt take the inconvenience with the convenience; they muſt abide by the conſequences reſulting from the courſe of conduct which, upon the whole knowledge of the matter, they have thought proper to purſue. It could not in this caſe have been a ſecret, that force was to be uſed for the protection of the property. It muſt have been known to the laders of the cargo, that this ſhip was to ſail as a ſingle ſhip, and to fight her way home, ſince a large number of men were openly and publicly collected for the purpoſe of enabling her to reſiſt a hoſtile force. I cannot entertain a doubt that the *Americans* might, upon juſt and ſound principles, have condemned this property. The caſe which has been cited from the *American* Reports, is much too indiſtinct to aſſiſt the Court in forming its judgment upon the practice of the *American* Court. The ground upon which ſalvage was there given, does not appear to be of great authority either one way or the other. I decree reſtitution of this property, on payment of the uſual ſalvage to the recaptor.

July 29th, 1814.

FOLTINA,—JULINS.

Ships seized in the harbour of of an island conquered and taken possession of by *British* Forces are condemnable as Droits of Admiralty though the Conquest of the island may not have been confirmed to *Great Britain* by a Treaty of peace.

THIS was the case of a ship and cargo seized on the 15th of *December*, 1811, whilst lying at anchor in the roadsted of *Heligoland*, which island had been surrendered to His Majesty's forces on the 5th of *September* 1807. The question was, whether the ship and cargo should be condemned as droits of Admiralty or otherwise.

JUDGMENT.

Sir *W. Scott*.—This is the case of a vessel which was taken in the roadsted of *Heligoland*, not at the time of the surrender of the island, but afterwards, and the seizure is represented to have taken place within the *harbour*. The locality of the transaction is, I think, sufficiently described by the term made use of by the witnesses, who must be understood to mean that portion of the sea to which vessels are carried for the purpose of landing their cargoes at *Heligoland*; and whether the same portion of the sea is more or less inclosed, whether it is completely land-locked or not, does not appear to be material to the issue in the present case. The Gazette, too, describes the place as a *haven*, a compliment to which it is certainly not, in strictness, entitled; but it is used as a haven, and may, therefore, fairly be considered as such, at least for the purposes of the present question. There is certainly no reason for saying that the property is not within the grant of the Crown to the Lord High Admiral, so far as the locality of the seizure is concerned; for it is the ordinary rule, that ships, taken in such places during the existence of hostilities, become droits of Admiralty.

But

The FOLTINA.

July 29th, 1814.

But the chief point to be conſidered is, whether, at the time this ſeizure was made, *Heligoland* formed part of the dominions of the Crown of *Great Britain* or not. The iſland, it appears, had been conquered and taken poſſeſſion of by *Britiſh* forces, but the conqueſt had not been confirmed to this country by a treaty of peace. It was a firm capture in war, but was ſtill ſubject to a kind of latent title in the enemy, by which he might have recovered it at the concluſion of the war, provided this country would have conſented to its reſtitution.

It is ſomewhat extraordinary, that, in the courſe of the numerous and long wars in which this country has been engaged, no caſe ſhould have been determined which might ſerve as a guide to the Court in the deciſion of the preſent queſtion. It does not appear that any caſe of the kind has hitherto occurred, with the ſolitary exception of that which has been mentioned in the argument, (the *Eſperanza*,) and that is admitted to have paſſed with very little notice, and without oppoſition. A caſe thus paſſing *ſub ſilentio* cannot be conſidered of great weight in point of authority. I obſerve that the grant from the Crown to the Lord High Admiral applies to the King's dominions generally, and that there is nothing which points to a diſtinction between thoſe parts of the King's dominions over which the Crown has *plenum dominium* or otherwiſe. No point is more clearly ſettled in the Courts of common law than that a conquered country forms immediately part of the King's dominions. (*Campbell* v. *Hall*, *Cowper's Rep.* 208.) In a late inſtance, we know that an iſland ſo acquired (*Guadaloupe*) was transferred to a third power, ſubject, undoubtedly, to the ſhadowy right of the former proprietor. It is ſaid, that

The FOLTINA.

July 29th, 1814.

a conqueſt of this kind may be re-acquired *flagrante bello* by the ſtate from which it was taken; but ſo may any other poſſeſſion, though forming part of the original and eſtabliſhed dominions of the Crown of this country, if the enemy has it in his power to make the conqueſt. The ſame obſervation is applicable to the *Iſle of Wight*, as well as to *Heligoland*, for the enemy has the ſame right to make a conqueſt of the one as the other. It is ſaid that the enemy may recover back the iſland of *Heligoland* when peace takes place; but it is equally true that the conqueror may retain it if he can; and, if nothing is ſaid about it in the treaty, it remains with the poſſeſſor, whoſe title cannot afterwards be called in queſtion. The diſtinction between the two ſpecies of territories is, in fact, rather more formal than real and ſubſtantial, at leaſt I muſt profeſs my inability to ſee any diſtinction between them that can materially affect the preſent queſtion. The power of the *Britiſh* Government was full and complete; and, though the Lords Commiſſioners of the Admiralty might not have interpoſed the particular authothority with which they are inveſted, yet the Crown had exerciſed its authority, and the Admiralty, as the grantee of the Crown, would ſucceed to its rights. It might have erected a court there, for the exercise of Admiralty juriſdiction; and, if it did not, I preſume that it only refrained from ſo doing becauſe it was not thought that publick convenience required it. The enemy certainly had no right to ſay that a Court of that kind ſhould not be there erected. Under the circumſtances, I think there is no ſolid ground for the diſtinction that has been taken; and though I am by no means diſpoſed, at this time of day, to enlarge the bounds of the ancient grant from the Crown to the

Lord High Admiral, which is now become of leſs conſequence, yet it is the duty of the Court to maintain ancient landmarks. I ſhall pronouhce for the claim of the Admiralty, and condemn this ſhip as droits of Admiralty.

The FOLTINA.

July 29th, 1814.

JONGE JAN, SCHUIL.

July 29th, 1814.

THIS ſhip, laden with a cargo of maſts, ſpars, and linſeed, was captured on the 20th of *July* 1804, in the proſecution of a voyage from *Riga* oſtenſibly to *Embden*, by His Majeſty's ſhip *Lynx*, and carried to *Plymouth*. On the 4th of *September* following, the uſual proceedings were inſtituted againſt the ſhip and cargo; and, on the 7th of the ſame month, the judge, upon the joint-prayer of the proctor of the captors, and of the proctor of the Admiralty on behalf of the Navy Board, directed the cargo to be ſold to His Majeſty's Government, and the proceeds to be brought into the regiſtry. The ſhip was then brought from *Leith* to the River *Thames*, by order of the Commiſſioners of the Navy, and the cargo delivered into His Majeſty's Dock Yard at *Deptford*.

Captors are barred by laſſe of time from calling for the inveſtigation of accounts between themſelves and the commiſſioners of the navy, unleſs it can be ſhewn that they had it not in their power to obtain a reviſion at an earlier period.

A claim was given for the maſts and ſpars, as the property of a merchant at *Embden*; and another, for the linſeed, as the property of Meſſrs. *Hanſeen* and Co., of *Riga*. On the 10th of *October*, farther proof was ordered of the property and deſtination of the cargo; which being exhibited, on the 6th of *April* 1805, the linſeed was decreed to be reſtored, with the expences of the claimant. On the 20th of the ſame month, an account of the value of the linſeed was brought in by

The JONGE JAN.

July 29th, 1814.

the proctor for the claimant, and referred to the regiſtrar and merchants, who reported the value of the linſeed to be £285 7s. 10d., and the amount of the claimants proctor's bill to £88. 11s. 6d., making, together, the ſum of £373. 19s. 4d., which was accordingly paid by the commiſſioners of the navy. On the 3d of *July*, 1806, the maſts and ſpars were condemned as prize to the captors, ſubject to the *Britiſh* claimant's expences; and the proceeds were directed to be brought into the regiſtry. On the 30th of *October*, 1806, the proctor for the Admiralty brought in the ſum of £1794. 7s. 11d. for payment of the cargo, but without ſpecifying the manner in which the account was made out. It was afterwards aſcertained, that it was made out in the following manner:

Timber and ſpars, according to the valuation, made by the Navy Board officers at Deptford Yard -				2,544	18 5
From which the following ſums were deducted:					
Duties paid by the Clerk of the Cheque - -				259	15 0
Amount of report on the value of the linſeed reſtored - -	285	7	10	373	19 4
Proctor's bill for claim of ditto	88	11	6		
Bill of coſts purſuant to decree of 3d of July, 1806 - -				116	16 2
				750	10 6
				£1794	7 11

The ſum of £259 15s. 0d. having been improperly paid for duties, the agents of the captors recovered back,

The Jonge Jan.

July 29th, 1814.

back, from the Commiſſioners of the Cuſtoms, £252 12s. 0d. out of the ſum which had been ſo improperly paid; and, in the courſe of inveſtigating the buſineſs relative to the duties, it was diſcovered that the Commiſſioners of the Navy had deducted the ſum of £373. 19s. 4d. for the value of the linſeed reſtored, and of the proctor's bill, from the amount of the valuation of the maſts and ſpars condemned to the captors. In conſequence of this diſcovery, application was made to the proctor for payment to the captors of the amount ſo deducted, and the ſum of £242. 18s. 10d. the actual proceeds of the ſale of linſeed, was then brought into the regiſtry. This ſum was £129. 2s. 9d. leſs than had been deducted by the Commiſſioners of the Navy for the reported value of the linſeed reſtored, including the proctor's bill for the claim of it; and the queſtion was, whether this difference between the valuation of the linſeed which had been reſtored, and the proceeds ariſing from the actual ſale of it, ought to be deducted from the value of that part of the cargo which had been condemned to the captors.

For the Captors, it was contended, that it was not incumbent upon them to pay out of the goods condemned as prize to them the difference between the actual proceeds of the other part of the cargo, and the ſum decreed to be paid to the claimants by the Court.

On the other ſide, it was ſaid, that, in the caſes of ſhips laden with naval ſtores, which have been ordered to be ſold to His Majeſty's Government, when the ſhips and cargoes were decreed to be reſtored, the value of the cargoes and the expences of the claimants, and

The Jonge Jan.

July 29th, 1814.

the freight and expences of the maſters, and alſo the *the expences of the captors*, were paid by the Navy Board. That, in caſes in which condemnation of part of the cargo took place, the Navy Board, in making payment to the captors of the value of the condemned property, deducted from it ſuch loſs or expences as had ariſen from other parts of the cargo of the ſame ſhip, and that, by this mode of proceeding, the whole benefit ariſing from the capture was paid to the captors. It was further ſubmitted, that the captors being in all caſes ſecure of receiving full indemnification by payment of their expences, it was not juſt and reaſonable, that in caſes where loſs was occaſioned by reſtitution of one part of the cargo, and gain accrued by the condemnation of another part of the ſame cargo, that the whole of the loſs ſhould be borne by His Majeſty's Government, and the whole of the profit accrue to the captor; but that the loſs upon one part ought to be deducted from the profit on the other, and the balance, being the whole of the benefit ariſing from the capture, be paid to the captor. Laſtly, it was ſubmitted, that the captor was barred by lapſe of time, from calling for the inveſtigation of accounts which had been ſo long ſettled.

In reply, it was ſaid, that the Navy Board had no right to deduct from the value of the goods condemned, loſſes on payments, or allowances made for the goods reſtored, becauſe ſuch allowances are a compenſation to the owners for the inconvenience they may ſuſtain, in conſequence of the privilege of pre-emption exerciſed by the Government, in which the captor had no intereſt; and that the real value of the parts of the cargo condemned to him ought not, therefore,

therefore, to be charged with any deduction on that account.

With reſpect to the laches imputed to the captors, in not making the demand at an earlier period, it was ſaid that they had uſed due diligence in proceeding ſince the diſcovery of the error was made. That the delay was to be imputed altogether to the manner in which the account had been brought in on behalf of the Navy Board, from which it was impoſſible to diſcover that any deductions had been made from the proceeds of the condemned part of the cargo,

JUDGMENT.

Sir *W. Scott.*—This is an objection taken to an account of the Commiſſioners of the Navy, dated ſo long back as the year 1806. On the 30th of *October*, in that year, the proctor for the Admiralty brought in a ſum of money for the payment of part of the cargo which had been condemned to the captors. At this great diſtance of time, the Court would be inclined to hold the account to be entirely ſettled, and not liable to to be ripped up, unleſs it could be ſhewn by the complainants that they had it not in their power to obtain a reviſion at an earlier period. It is alleged, on the part of the captors, that although the general ſum was brought in at the period before-mentioned, yet the particular account, with the different items, was not produced till very lately, and, conſequently, that the parties had no opportunity of inveſtigating the buſineſs before the preſent time. If the parties really had no earlier opportunity of looking into the tranſaction, I ſhould not feel diſpoſed to exclude them now, and

to

The JONGE JAN.

July 29th, 1814.

to hold them to be barred by mere lapſe of time. But is it a fact that the parties have had no ſuch opportunity? Would not this Court, upon application made to it, have compelled the production of the account long ago? Undoubtedly it would have done ſo. If parties chooſe to let matters ſleep for ſo great a length of time, even beyond the period fixed by the ſtatute of limitations, they muſt take the conſequences of their own *laches*, for the Court will not ſuffer itſelf to be called upon to open accounts ſo ſtale and antiquated as theſe are. If enquiries of this kind are to be now entered into, I do not ſee where the matter is to end. It is impoſſible to ſay what limitation is to be put, or what number of caſes may be affected. If I am to go back ſeven years, why not ſeventeen? The whole time of the Court might be taken up in the inveſtigation of theſe antiquated accounts. I think myſelf fully at liberty to decline going into the queſtion, and to conſider it as long ago concluded between the parties.

Mode adopted by the Navy Board of ſettling accounts with the captors in caſes where the Government has the right of pre-emption of part of the goods captured, though apparently liable to objections, is not deficient in equity, and may be juſtified and made valid by the mutual underſtanding of the Parties, collected from their acts and the nature of the tranſaction.

But if the Court was to enter into the tranſaction, I muſt ſay, that the mode which the Navy Board has adopted appears to me to be not deficient in equity, though it may, perhaps, be apparently liable to the objections that have been taken. Suppoſing that there is ſome irregularity in the courſe which they have purſued, I am of opinion that it is juſtified, and made valid by the ſort of mutual underſtanding that is to be collected from the acts of the parties and the nature of the tranſaction. When a veſſel is taken, having on board a cargo of mixed goods, ſome of which are fit for His Majeſty's ſervice, the Navy Board have the right of pre-emption of ſuch goods; and, in order to reconcile neutrals to the exerciſe of this right, and to

The Jonge Jan.

July 29th, 1814.

prevent the inconvenience that might ariſe to them from a ſeparation of the cargo, it is thought adviſable to purchaſe the other part of the goods on board. The captor is exonerated from the danger of coſts and damages, and is fully indemnified by the payment of his expences. The capture is conſidered not as his own act, but as that of the Government acting by the Navy Board. Being ſo guaranteed from the loſs by the Government of the country, it appears to be not unreaſonable, that he ſhould ſtand on a footing ſomewhat different from that which he would have done if he had been acting merely upon his own reſponſibility, and conſequently anſwerable to the utmoſt extent for any indiſcretion he might have committed. It is to be obſerved, likewiſe, that the captor is himſelf the perſon who puts the tranſaction into the ſhape it has aſſumed; for he makes the application, praying that the goods may be ſold to the Government. It has been ſtated, and truly ſtated, to be the common uſage of the Navy Board, to ſettle theſe matters in this ſort of general average way, and it muſt be preſumed that the party was aware of the cuſtom which prevailed. Looking, therefore, to the circumſtance that the placing this cargo in the hands of Government is the act of the party himſelf; looking alſo to his diſcharge from all reſponſibility, and to the known and prevailing practice in the conduct of ſuch matters, I think it not unequitable, that it ſhould be taken out of the courſe of ordinary capture, and ſhould ſtand on the footing on which it has been placed by the common acts and underſtanding of both parties.

In the courſe of the diſcuſſion, I took occaſion to aſk where the profit was to go, if any profit aroſe, conceiving

The JONGE JAN.

July 29th, 1814.

conceiving certainly that the captor was entitled to the profit if he was ſubject to the loſs. It was ſaid, that the captor could not derive any profit from the ſale of theſe goods, as he could take only under a ſentence of condemnation; but I think he might have been entitled under an order of the Court for the payment to him. If the captor is not to take the profit, who is? Not the claimant, for he has already been paid, and has withdrawn. The Government cannot; for the Navy Board, acting on its behalf has actually brought the money into the regiſtry. The Court could not retain it, I think the captor would be entitled, and, if ſuch was the ſituation of the preſent caſe, I ſhould not heſitate to order the money to be paid out to him.

Upon theſe grounds, the matter might be ſupported, if it were now open to examination; but I am of opinion, that the right of enquiry is barred by lapſe of time, and that it is not open, at this late hour, to enter upon a conſideration of the account.

THE JANE, BIRKLEY.

November 4th, 1814.

A hired transport in the Service of Government may be the subject of Bottomree as well as any other Veſſel, and the Hypothecation of ſuch hired Tranſport may be valid, though the particular voyage on which ſhe was bound ſhould not be ſtated in the bond.

THIS was the caſe of a *Britiſh* tranſport in the ſervice of Government, which, whilſt lying at *Gibraltar*, was hypothecated by the maſter to Meſſrs. *Gordon* and *M'Ray*, merchants there reſident, by a bond dated *March* 25th 1812, for the ſum of £750. The condition of the bond was, that if a bill drawn by the maſter for that ſum in favor of Meſſrs. *Gordon* and *M'Ray* ſhould be paid, or if the maſter ſhould diſcharge the amount with 5 per cent. intereſt per month within twenty days after the arrival of the ſhip in any port of *Great Britain*, or if on ſuch voyage as the ſhip ſhould be ordered upon in the courſe of the ſervice, an utter loſs ſhould take place, then the obligation was to be void or elſe to remain in force. The ſhip proceeded from *Gibraltar* with *French* priſoners, and put into *Portſmouth*, where ſhe was arreſted by the bond-holders before the expiration of the twenty days. She was afterwards bailed, and the owners appeared under proteſt.

In ſupport of the proteſt it was contended, that the arreſt was made before the bond was due; that therefore the bail had a right to ſay there was no juſt cauſe of action; and that they ought to be diſmiſſed.

But the Court ſaid, I am of opinion to over-rule the proteſt, for it is alleged on the part of the bond-holders, that the ſhip was going to leave the kingdom, and this is not denied in the act. Had it been denied or proved to have been an unfounded apprehenſion, the caſe might have been different.

The

The JANE.

November 4th, 1814.

The cauſe then proceeded on the merits, and the bond was attempted to be impeached on the following grounds; that it would be injurious to the public intereſts, if tranſports in the ſervice of Government could be the ſubject of bottomree; that the voyage on which the ſhip was deſtined was not expreſſed in the bond, which was ſaid to be an eſſential requiſite; that the maſter who granted the bond had been ſuperſeded at the time he executed it, and was ſo known to be by the grantors; that there was no account of the items which compoſed the amount, nor of the application of the money; and that a bill of exchange, another ſpecies of ſecurity, had been given for the money, on account of which the bond was ſaid to be granted.

JUDGMENT.

Sir *W. Scott*.—This is a proceeding upon a bottomree bond given at *Gibraltar*, upon a ſhip of a peculiar character. I ſay of a peculiar character, becauſe bonds of this deſcription are uſually given upon merchant veſſels, which have definite voyages; but this was a hired tranſport in the ſervice of Government, and of courſe without any fixed voyage, liable to be ſent to any part of the world, according to the exigencies of the public ſervice. I cannot accede to the doctrine, that a ſhip of this deſcription is incapacitated from being the ſubject of hypothecation by a bottomree bond. Were I to hold that all bottomree bonds granted on ſuch veſſels neceſſarily were invalid, very ſerious inconvenience might enſue, and the public ſervice inſtead of being benefited, might be ſubjected to very injurious obſtructions. If the neceſſary ſupplies could not be obtained in this mode, the tranſportation of ſtores might

The JANE

November 4th, 1814.

might be delayed, priſoners requiring to be removed might ſtill remain. In ſhort, there is no object for the accompliſhment of which theſe veſſels are employed, which might not be defeated or inconveniently poſtponed. I think, therefore, there is no ſufficient ground for contending that hired tranſports may not be the ſubject of bottomree as well as other veſſels. This furniſhes an anſwer alſo to the other objection; that the particular voyage, on which the ſhip was deſtined was not ſtated in the bond. It is impoſſible that the maſter ſhould deſcribe the voyage with preciſion, becauſe he is ſubject to the orders of Government, which may at any time alter the deſtination of the veſſel at its pleaſure: the maſter can only come *ci pres*; he muſt deſcribe the voyage as near as he can. It cannot for a moment be admitted, that the bond is invalid for want of a particular deſcription of the the voyage, when the voyage itſelf is not under the controul of the party granting the bond, but liable to be changed at the diſcretion of Government.

The ſhip ſailed from *Gibraltar* with *French* priſoners deſtined as aſſerted, to *Leith*; for ſome reaſon or other ſhe put into *Portſmouth*, why or how does not appear, whether by neceſſity or in conſequence of orders: The ſhip was there arreſted before the bond became due, which was to be payable twenty days after the arrival of the ſhip in a port of *Great Britain*. However before the arreſt of the ſhip, application was made to the owners, and payment refuſed by them. It does not appear that any explanation took place, or that any intimation was given; that the ſhip was going to *Leith*, or that payment ſhould be made upon her arrival at that port. Had that been the caſe, it would have been more correct to have waited till the ſhip reached *Leith*,

and

The JANE

November 4th, 1814.

and then to have applied to the tribunal in that part of the United Kingdom which has cognizance of ſuch queſtions. But the party found, as he ſtates, that the ſhip was about to quit *Portſmouth* to proceed, he knew not whither, and therefore he arreſted her. The ſhip itſelf was not detained but releaſed upon bail, ſo that no inconvenience was occaſioned to the public ſervice. The ſeizure was perhaps premature. But ſhall the Court on that account, the time of payment having long ſince arrived, compel the party to relinquiſh theſe proceedings, ſeek another juriſdiction and begin again *de novo?* What advantage would be derived? *Cui bono* ſhould I occaſion ſo much delay and expence.

A party lending money on Bottomree is not obliged to ſee to the due application of it.

The queſtion then is whether this was a fair tranſaction? Whether the money was *bonâ fide* advanced on the repreſentation of the maſter, that he was in want of ſupplies. By the general law the maſter has a right to take up money in a foreign port for the uſe of his ſhip: as long as he remains the oſtenſible maſter, exerciſing all the functions of that ſituation, he has the authority attached to it; *ei rei præponitur.* It is not alleged that the maſter had any perſonal credit; had he not reſorted to this mode of raiſing money, the ſhip might have laid in port till it periſhed by decay. I ſee no reaſon to ſuppoſe the maſter exceeded his power. It is a power certainly liable to abuſe, by the extravagance, indiſcretion, or diſhoneſty of the maſter. But the maſter is a perſon ſelected by the owners themſelves; they repoſe truſt in him, and hold him out to others as truſt worthy. This reaſoning is not confined to perſons employed in this capacity only, it is common to moſt ſituations in life; if a domeſtic ſervant employed by his maſter to purchaſe neceſſaries for the uſe of the houſe, miſapplies goods obtained under that pretence,

though

The JANE.

November 4th, 1814.

though the authority is abuſed, the maſter is ſtill liable for his acts. The tradeſman who ſupplied the goods is not to be a ſufferer, unleſs it could be ſhewn, that there was colluſion with the ſervant for the purpoſe of defrauding the maſter. If an order had been ſent for the diſmiſſal of this maſter, and he had in conſequence been actually diſmiſſed, the caſe would be different. But his accounts were to be previouſly ſettled; there is nothing to ſhew he was diſmiſſed at the time this money was advanced. On the contrary, Mr. *Gordon* ſwears that he was acting as maſter, and that he had not laid aſide that character. The agent of the tranſport office at *Gibraltar* confirms this ſtatement: he ſays the maſter did not give up the ſhip or the papers till ſome time after; he continued, therefore, diſcharging the functions of his ſituation. It is argued, however, upon conjecture that the merchant who lent the money knew that the maſter was going to be diſmiſſed; but if he had known it, ſtill this man was maſter at the time. Whilſt he continued in the viſible exerciſe of the command, he had authority to borrow money upon bottomree. Is there then any proof to ſatisfy me that this tranſaction was bottomed in bad faith, and that Mr. *Gordon* colluſively confederated with the maſter to defraud the owners? I ſee no reaſon whatever to induce me to come to ſuch a concluſion. I cannot agree to the doctrine that the party lending, is obliged to ſee to the application of the money. If there is no colluſion, if he has reaſonable ground for believing that the money is fairly borrowed, it is a known principle in theſe caſes that no ſuch obligation is impoſed upon the lender. There is no evidence to enable me to inveſtigate the conduct of the maſter; indeed it would hardly be fair to enquire at preſent, for he is abſent, and no party

The JANE.

November 4th, 1814.

to theſe proceedings. There may be ſome matters requiring explanation, which the maſter might afford if he were preſent. The tranſaction may be fair in all its parts, but taking it to be otherwiſe; ſuppoſing it to be tinged with a ſhade of diſhoneſty in the maſter, the merchant, if he did not participate in the guilt, could not be affected by it.

Bottomree Bonds may be valid though bills of exchange were given at the ſame time by way of collateral Security.

Then it is ſaid, that bills were given at the ſame time, and therefore that the lender looked to them and not to the ſhip; but this is the uſual practice; there is no inconſiſtency in taking ſuch a collateral ſecurity, nor has it ever been held to exclude the bond, or diminiſh its ſolidity. Mr. *Gordon* ſwears, he advanced the money on the bond ſolely. Suppoſing it to have been known that the maſter was about to be diſmiſſed, that circumſtance would make it more probable, that the lender ſhould look to the bond for his ſecurity. No prudent man knowing that the maſter was about to quit the ſhip, would advance money without the ſecurity of a bottomree bond. I think this man had a perfect authority to give a bottomree bond, and I ſee no ſufficient grounds on which its validity can be impeached. I ſhall therefore pronounce for the bond, referring the accounts as uſual to the regiſtrar and merchants to report thereon.

NEPTUNE THE SECOND.

November 29th, 1814.

JUDGMENT.

Owners are responsible for damage occasioned by the mismanagement of a ship though under the care of a regular pilot, and acting in obedience to his directions.

SIR *W. Scott.*—It is acknowledged in this case, that the damage was done by the ship proceeded against; but it has been set up, in the way of excuse, that she was, at the time, under the care of a regular pilot, and was acting in obedience to his directions; and it has been contended in the argument, that the pilot alone is answerable for any damage that may have been sustained in consequence of the mismanagement of the vessel. If the position could be maintained, that the mere fact of having a pilot on board, and acting in obedience to his directions, would discharge the owners from responsibility, I am of opinion that they would stand excused in the present case; for I think it is sufficiently established in proof, that the master acted throughout in conformity to the directions of the pilot. But this, I conceive, is not the true rule of law. The parties who suffer are entitled to have their remedy against the vessel that occasioned the damage, and are not under the necessity of looking to the pilot, from whom redress is not always to be had, for compensation. The owners are responsible to the injured party for the acts of the pilot, and they must be left to recover the amount as well as they can against him. It cannot be maintained that the circumstances of having a pilot on board, and acting in conformity to his direction, can operate as a discharge of the responsibility of the owners.

The question then is, whether the damage which has been sustained was occasioned by the neglect or misconduct

The NEPTUNE THE SECOND.

November 29th, 1814.

duct of thoſe who had the management of this ſhip, or whether it is to be attributed ſolely to the ſtate of the wind and weather. The affidavits with which the Court is furniſhed, in the way of evidence, are numerous enough. In that made by the maſter of the *Shark*, it is ſworn, " that, on *Thurſday*, the 6th of *January* " laſt the ſaid ſhip *Shark* was lying in *Standgate Creek*, " in the river *Medway*, faſt moored to the *Lazarette*, " called the *Princeſs Amelia*, having been under " quarantine; that, about noon of the ſaid day, a " ſhip, which afterwards proved to be the ſhip *Neptunus* " *the Second*, whereof *Chriſtian Hendrick Roſe* is " maſter, was ſeen ſtanding into the creek; and the " ſaid ſhip, having run ſome diſtance up the creek, " and within a ſhort diſtance of the ſaid Lazarette, " dropped her anchor, and attempted to bring up; " but, her anchor not holding, ſhe drove foul of the " ſaid Lazarette, and then fell athwart the ſtarboard " bow of the ſaid ſhip *Shark*, and carried away the " bowſprit, bumkin, head-rails, and ſprit-ſail yard, " and broke one of the anchors belonging to the ſaid " ſhip; and the deponent further maketh oath and " ſaith, that, in the ſtate of the wind at that time, it " blowing hard from the E. N. E. directly acroſs the " river and right into the creek, a veſſel could not " with ſafety, bring up in the lower part of the creek, " without furling her ſails before ſhe run in; or, if " ſhe neglected doing ſo, by running higher up in the " creek, and paſt the veſſels lying therein, and had " the ſaid ſhip *Neptunus* come up on the north ſhore " of the ſaid river *Medway*, her ſails could have been " furled before ſhe came into the creek, and ſhe might " then have brought to an anchor in ſafety, in any " part of the ſaid creek; but the ſaid ſhip, on the con-

" trary,

" trary, ſteered her courſe to leeward of two frigates " lying on the ſouth ſide of the ſaid river, and was " obliged, and did haul on a wind before, ſhe could " fetch into the creek; and that, notwithſtanding the " way the ſaid ſhip had when ſhe came into the creek, " it was incautiouſly attempted to bring her up at a " ſhort diſtance from the ſaid Lazarette, with her ſails " only clued up, and when it was not at all pro- " bable that, under the circumſtances, her anchor " would hold, and when ſhe might, with perfect ſecu- " rity, have run paſt the ſaid Lazarette, and have been " brought to an anchor higher up the creek, clear of " any of the veſſels lying therein; and the deponent " further ſaith, that the damage done to the ſaid ſhip " *Shark* was wholly occaſioned by a diſregard of " ordinary caution in bringing the ſaid ſhip *Neptunus* " to an anchor; and, had not the ſaid ſhip firſt ſtruck " the ſaid Lazarette, much more ſerious damage " would have been done to the ſaid *Shark*; and he " laſtly ſaith, (what I think very material) that, " having demanded of the ſaid *Chriſtian Hendrick Roſe*, " the maſter of the ſaid ſhip, a compenſation for the " ſaid damage, he gave the deponent a letter to Meſſrs. " *Denniſon and Co.*, of *London*, the agents of the " owners of the ſaid ſhip, who, as he has been in- " formed, and believes, have refuſed to make com- " penſation for the ſame." I cannot but think that this letter of the maſter's to the agents in *London* muſt have contained an admiſſion of the fact that the damage was occaſioned by the miſmanagement of the *Neptune*: it muſt have been produced, if it had not carried with it a confeſſion that ſome compenſation was due. But the caſe does not reſt upon the mere evidence of the maſter of the *Shark*, or of the crew of that ſhip. Here

The NEPTUNE THE SECOND.

November 29th, 1814.

is likewiſe the teſtimony of other perſons, diſintereſted ſpectators of what paſſed. The maſter of the Lazarette ſhip ſtates, "that he obſerved a foreign veſſel, which "afterwards proved to be the *Neptunus the Second*, "ſtanding into the creek in a very unuſual manner, "which excited his attention, the wind blowing hard "at the N. N. E.; and ſhe making great way through "the water; and in this ſituation between the *Belliſle*, "Lazarette, and the one under the deponent's com- "mand, the ſhip *Neptunus* let go her anchor, which "dragged until it caught the mooring-chain of the "*Princeſs Amelia*; the check ſo received then brought "the *Neptune* acroſs the bows of the ſaid Lazarette, "(about the fore-chains,) and then ſwang round with "very great violence upon the ſaid ſhip *Shark*, broke her "bowſprit, and did her other damage about the head; "and he further ſaith, that he is clearly of opinion "that the letting go the anchor, in ſuch circumſtances, "was improper; and a want of due caution in moor- "ing her, and particularly ſo, as they had only clued "up the ſails, and not furled them in time, whereby "the ſhip had too much way through the water to be "brought up ſo ſuddenly; and, in the deponent's "judgment, the ſhip ought to have been run higher "up the creek, where ſhe might have been moored "ſafely, and which courſe ſeveral ſhips that came in "with the ſame tide took, without doing or receiving "any injury." This ſtatement is fully confirmed by ſeveral other witneſſes. One of them, from on board the ſame ſhip, ſays, "that he obſerved, to ſome perſon "near, that he thought ſhe was making for the creek "in a very improper manner;" and this, he goes on to ſay, occaſioned him to pay particular attention to her courſe. Now what is there in oppoſition to all this? Nothing

The NEPTUNE THE SECOND.

November 29th, 1814.

Nothing but the affidavits of the foreign maſter and his crew, whoſe conduct is called in queſtion, and of the pilot, who is to be heard with great caution, becauſe he is himſelf reſponſible to the owners to the amount of the damages that may be recovered againſt them. There is nothing more in the form of evidence, except the opinion of a perſon who was not preſent, but who, on a mere repreſentation of the circumſtances made to him, intimates his opinion that every thing was properly done. The teſtimony of this man does not appear to be entitled to much attention. It is to be conſidered as a ſort of fraternal affidavit, made for the purpoſe of exempting a brother pilot from reſponſibility. I am of opinion that the damage is proved to have been occaſioned by the miſmanagement of the *Neptune*, and that the owners of that ſhip are bound to make it good, and I pronounce accordingly.

HARE, BERTODDY.

March 15th, 1815.

Parties have generally a right to revoke the appointment of their agents; but a naval agent who has duly regiſtered his power, and has actually intermeddled with the buſineſs and conducted it practically to a conſiderable extent, is not removeable at the mere caprice of the party by whom he was appointed.

THIS was a queſtion of agency between Mr. *James Sykes*, aſſerting himſelf to be entitled as the ſole agent of *Richard Byron* Eſq. the commander, officers, and crew of H. M. S. *Belvidera*, to receive, out of the regiſtry of the Court, a moiety of the proceeds of this ſhip and cargo, and nine tenths of the remaining moiety, in virtue of a warrant under the Royal Sign Manual, directing the ſame to be paid to the commander, officers, and crew of the *Belvidera*, or their *agent or agents lawfully appointed*, and Mr. *William Ayre*, who claimed to be an agent for th eſame property jointly with Mr. *Sykes* and Meſſrs. *Hartſhorn*, *Boggs*, and Co. of *Halifax*, in *Nova Scotia*.

The HARE.

March 15th, 1815.

The ſhip and cargo were ſeized on the 21ſt of *Auguſt* 1812, prior to the declaration of hoſtilities againſt the United States of *America*, and carried into *Halifax*, in the Vice Admiralty Court of which place they were afterwards condemned as Droits of the Crown. On their arrival in that port, they were delivered into the cuſtody of Meſſrs. *Hartſhorn*, *Bogg*, and Co., who together with Mr. *Ayre* took the neceſſary ſteps, and continued to have the care and cuſtody of the property, till it was taken charge of in the month of *March* 1813, by the authority of the agent appointed by the commiſſioners for the care and management of *American* Droits. They likewiſe afforded aſſiſtance in preparing a great part of the cargo for the ſale which afterwards took place under the authority of the Court of Vice Admiralty. Before the ſeizure took place, viz. on the 23d of *June* 1812, a power of agency to the following effect was executed by captain *Byron*, the officers, and crew: "We do nominate, conſtitute, and "appoint Meſſrs. *Hartſhorne*, *Boggs*, and Co. Mr. "*William Ayre* and Mr. *James Sykes*, jointly and ſeve-"rally to be our true and lawful attornies and agents, "for us and in our names and for our uſe to ſolicit "and tranſact, and take care of all our concern and "intereſt, in any and every prize or prizes, ſeizure "or ſeizures, recapture or recaptures, that have "been or may hereafter be taken, ſeized, retaken, or "deſtroyed by the ſaid ——— belonging to any "ſtates or powers or their ſubjects which now are or "hereafter may be at war with *Great Britain*, or "to which we may become entitled by any means "whatſoever; giving and hereby granting to our "ſaid attornies and agents, our full power and autho-"rity in the premiſes, for inventorying, appraiſing,

"ſelling

The HARE. March 15th, 1815.

" ſelling or otherwiſe diſpoſing of all ſuch prizes, ſei-
" zures, or recaptures, their cargoes, goods, guns,
" tackle, apparel and furniture, either by public or
" private ſale, as they ſhall think moſt fit, and for
" receiving the proceeds ariſing therefrom out of the
" regiſtry of the High Court of Admiralty, or of any
" Court of Vice Admiralty, or of and from any per-
" ſon or perſons whatſoever, in whoſe cuſtody or poſ-
" ſeſſion the ſame may happen to be; and to receive
" of and from the treaſurer and commiſſioners of His
" Majeſty's Navy, or whom elſe it may concern, all
" bounty or other money to which we are or may be-
" come entitled by virtue of the capture or deſtruction
" of any ſhip or veſſel of war belonging to the enemies
" of *Great Britain*, or by virtue of any prize, ſeizure,
" recapture or detention whatſoever, &c." Other letters of agency were executed on the 23d of *October* 1813 by Captain *Byron*, and ſome of the officers and crew, in favor of Meſſrs. *Sykes* only; but this inſtrument not being ſigned by a ſufficient number of each claſs, new letters of agency were executed by them on the 28th of *September* 1814. Theſe letters of agency were in the following terms: " We nominate, conſtitute,
" and appoint *James Sykes* ſenior and *James Sykes* ju-
" nior, of *Arundel Street*, *London*, jointly and ſeverally
" to be our true and lawful attornies and agents, for
" us, and in our names and for our uſe to ſolicit,
" tranſact and take care of all our concern and intereſt
" in any and every prize or prizes, ſeizure or ſeizures,
" *Droits of Admiralty*, recapture or recaptures that
" have been or may hereafter be taken, ſeized, re-
" taken or deſtroyed by the ſaid ſhip, belonging to any
" ſtates or powers or their ſubjects, which now are or
" hereafter may be at war with *Great Britain*, or to

" which

The HARE.

March 15th, 1815.

" which we are or may become entitled by any means " whatſoever; giving and hereby granting to our ſaid " attornies and agents our full power and authority in " the premiſes, for inventorying, appraiſing, ſelling or " otherwiſe diſpoſing of all ſuch prizes, ſeizures, or " recaptures, their cargoes, goods, guns, tackle, " apparel, and furniture, either by public or private " ſale, as they ſhall think moſt fit, and for receiving the " proceeds ariſing therefrom out of the regiſtry of the " High Court of Admiralty, or of any Court of Vice " Admiralty, or of and from any perſon or perſons " whatſoever in whoſe cuſtody or poſſeſſion the ſame " may happen to be; and to receive of and from the " honourable the treaſurer and commiſſioners of His " Majeſty's Navy, or whom elſe it may concern, all " bounty or other money, to which we are or may " become entitled by virtue of the capture or deſtruc- " tion of any ſhip or veſſel of war belonging to the " enemies of *Great Britain*, or by virtue of any prize, " ſeizure, recapture, or detention whatſoever, &c."

It was ſworn by Captain *Byron* in an affidavit made by him " That the letters of agency executed on the " 23d of *June* 1812 in favor of the ſaid *Hartſhorne*, " *Boggs*, and Co., *William Ayre* and *James Sykes*, were " meant and intended to relate to their intereſts in " ſuch captures as ſhould be adjudged lawful prize to " the Deponent and his officers and ſhip's company, " and not to any veſſel or cargo which might be " detained by reaſon of any embargo or other pro- " viſional orders of His Majeſty's Government; " and no directions or inſtructions whatever were " given either to the ſaid Meſſrs. *Hartſhorne*, *Boggs*, " and Co., or to the ſaid *William Ayre*, relating to " any other intereſts of the Deponent, his officers and " ſhip's company, in the ſaid ſhip and cargo: And he

" further

" further made oath, that as ſoon as it became neceſ-
" ſary to appoint an agent, to preſent memorials to
" His Majeſty's Government, and to take the proper
" ſteps to obtain remuneration for ſuch ſeizure, direc-
" tions were given to Meſſrs. *Sykes* to act accordingly;
" and letters of agency were executed by this Deponent
" and many of his officers and crew in favour of the
" ſaid Meſſrs. *Sykes*, bearing date the 23d day of
" *October* 1813, but the ſame not being ſigned by a
" ſufficient number of each claſs, new letters of agency
" were executed to the ſaid Meſſrs. *Sykes*, upon the
" 28th day of *September* 1814, intended eſpecially
" to authorize them to ſolicit the grant from the pro-
" ceeds of all ſhips and cargoes detained under the
" proviſional order aforeſaid, by His Majeſty's ſaid ſhip
" *Belvidera*, and for that purpoſe the words *Droits*
" *of Admiralty* were inſerted at the time of the exe-
" cution of the ſaid letters of agency in addition to
" the uſual printed form, there not being at the ſaid
" time any property which the appearer has ſince un-
" derſtood to be property called Droits of Admiralty,
" to which ſuch words applied, &c."

Mr. *Sykes* having obtained from *Halifax* the proper documents, preſented a memorial to the Lords of His Majeſty's Treaſury, and ſucceeded in procuring the preſent warrant for the payment of the money out of the regiſtry of the Court. Mr. *Ayre*, who had returned to *Europe*, alſo wrote to *Halifax* for the neceſſary documents to enable him to preſent memorials to the Government to obtain the warrant, but received an anſwer from Meſſrs. *Hartſhorne*, *Bogg*, and Co. ſtating that the documents had already been forwarded to Mr. *Sykes*. In conſequence of this information he did not deem it proper to put the Captors to any additional expence by preſenting another memorial.

JUDGMENT.

The HARE.

March 15th, 1815.

JUDGMENT.

Sir *W. Scott*.—This queſtion turns upon a preference between two rival powers of agency, applying as it is contended on the one ſide, but denied on the other, to bounty money which has been granted by His Majeſty to the ſeizors, out of the proceeds of an *American* veſſel and cargo, which was ſeized and detained by the orders of Government, before the commencement of hoſtilities between this country and *America*. On the breaking out of hoſtilities the veſſel and cargo were proceeded againſt in the Vice-Admiralty Court at *Halifax*, and the ſame were condemned. The ſeizors had appointed certain agents prior to this capture, in the uſual form; and, after the proceedings had taken place, they alſo appointed an agent ſpecially for the management of this property. It is quite clear that parties may execute powers for different purpoſes, and to different perſons; they may grant a power to one agent for the diſtribution of prize, and may confine it to the matter of prize, and they may appoint another agent for the diſtribution of bounty. His Majeſty is not *bound* to grant any bounty, and therefore ſuch a power would be only eventual. I obſerve that in the memorial preſented to His Majeſty, the word "*remuneration*" has been made uſe of, a word not correctly uſed on occaſions of this kind. By referring to the Act of Parliament, it will be found that the words *Bounty or property gratuitouſly given*, would have been more appropriate terms.

The firſt queſtion ariſes upon the validity of the firſt power as applicable to both ſpecies of property, to bounty as well as to prize. If that be not a valid power, as to this bounty money, the party ſtanding upon it could have no right to queſtion the title of another perſon claiming to act under an inſtrument of a later

The HARE. — March. 15th, 1815.

a later date. In order to determine that queſtion I muſt look at the terms of the power of attorney, and they certainly are terms of very large import: It appoints the parties therein named, "jointly and ſeverally, to be our true and lawful attornies and agents for us, and in our names, and for our uſe, to ſolicit and tranſact, and take care of all our concern and intereſt in any and every prize or prizes, *ſeizure or ſeizures*, recapture or recaptures, that have been, or may hereafter be, taken, *ſeized*, retaken, or deſtroyed, belonging to any ſtates or powers, or their ſubjects which now are, or hereafter may be, at war with *Great Britain*, to which we may become entitled by any means whatſoever;" and it goes on to ſay, "that they are empowered to receive of and from the Honourable the Treaſurer and Commiſſioners of His Majeſty's navy, or whom elſe it may concern, *all bounty*," (the very technical term which is uſed in the Act of Parliament,) "*all bounty* or other money to which we are, or may become, entitled, by virtue of the capture or *detention* of any ſhip or veſſel of war belonging to the enemies of *Great Britain*, or by virtue of any prize, *ſeizure*, recapture, or *detention* whatſoever." Now how it can be contended, that theſe words do not apply to a caſe like the preſent, I am at a loſs to conceive. The clauſe in the Act of Parliament, referring to theſe ſpecies of grants, confirms this interpretation: for it contains no direction for the appointment of freſh agents, but merely gives to *Greenwich* Hoſpital the unclaimed ſhares of theſe matters of bounty, as the law had before given to it the unclaimed ſhares in matters of prize. Looking, therefore, at the terms of this power, which are as univerſal as terms can be in their extent, and as preciſe in their application to the caſe; and looking at the clauſe of the Act of Parliament,

The HARE.

March 15th, 1815.

ment, I have no doubt whatever, that they apply as much to matters of bounty, as to matters of prize. But it is ſaid that theſe letters of agency, which were executed on the 23d of *June*, 1812, were *meant and intended* to be ſtrictly confined to prize-intereſt; *meant and intended* by whom? That is not ſtated. The only perſon that ſpeaks to the matter of *intention* is Captain *Byron*; but he can only be allowed to ſpeak for himſelf; and, if he had intended to limit the powers of agency to matters of prize only, his buſineſs was not to uſe words of ſuch large import, as to include bounty as well as prize. A party cannot be heard to ſay, that although I have ſigned this inſtrument, my intention and meaning was different. If, indeed, there had been any ambiguity in the language, he might then perhaps have been permitted to come forward and explain it; but where the inſtrument ſpeaks for itſelf, he cannot be heard to aver againſt his own act, even for himſelf, and much leſs for a hundred other perſons.

I have made enquiry, and find it has been the conſtant practice for the ſame agent to act in caſes of bounty as in matters of prize; and it is a matter of great convenience that it ſhould be ſo. The determinations in the caſe of the *Expedite*, and in the caſe of the *Ondernehming*, were to this effect—that letters of agency were as applicable to one ſpecies of intereſt as to the other.

So much for this part of the caſe, as to the applicability of the firſt inſtrument to matters of bounty. But then comes another queſtion, Has this power of attorney been revoked by a ſubſequent inſtrument of the ſame kind? Parties have generally a right to revoke the appointment of their agents; but this Court has always looked upon a naval agent as a kind of public character, and, conſidering the public truſt with which

The HARE. — *March 15th, 1815.*

he is inveſted, if he has acted in the caſe, It will not be inclined to hold his power of agency to be revoked without juſt cauſe ſhewn; if there has been miſconduct, groſs negligence, or embezzlement of any kind, which deſtroys the confidence repoſed in him, it would be the duty of the Court to interfere; but where the agent has duly regiſtered his power, and has actually intermeddled with the buſineſs, and conducted it practically, to a conſiderable extent, he is not to be removed at the mere fancy and caprice of the party by whom the appointment was made. Now, in this caſe, it is perfectly clear that theſe parties have intermeddled with this property. The veſſel was carried into *Halifax*, and they did every thing that agents could do for the preſervation of the property, until the Crown interfered and put it into the hands of its own agents. Since that time, it appears, that a memorial has been preſented by Mr. *Sykes*, which would alſo have been preſented by them, but for the conſideration of ſaving the expence. They poſſeſs, therefore, every thing that is required by the Court to ſhew they are in rightful poſſeſſion of the truſt; but I am further of opinion, that the inſtrument here ſet up in oppoſition is not even valid for the purpoſe of revocation. There was an inſtrument executed, which was conceived to be inaccurate and inſufficient, and therefore cancelled. Another power was afterwards executed in which the words, *Droits of Admiralty*, are introduced as properly deſcriptive of the property in queſtion. It turns out however that this deſcription does not apply, becauſe the property in queſtion is not a Droit of Admiralty, but a Droit of the Crown, as contradiſtinguiſhed from it. It is therefore not very reaſonable to demand at the ſame time that the Court ſhould give a ſtrict interpretation to the words in the original power, and a liberal

The HARE.

March 15th, 1815.

a liberal and enlarged one to thoſe that occur in the ſecond. The fact is, that the words of the ſecond power do not deſcribe the ſpecies of property, that is, the ſubject of conteſt, and therefore can have no revocatory effect upon the firſt. I have already ſaid, that where parties have proceeded to the extent theſe perſons have done, to continue the truſt in the ſame hands is matter of great convenience: It has been the general practice ſo to continue it, and the Court will not now depart from that practice. The other parties have preſented a memorial, and have advanced a ſum of money, which they muſt be reimburſed. I am of opinion upon the whole of the caſe, that the firſt power of agency is perfectly good, and extends to all the parts of the property, and that it has not been revoked by any ſubſequent power of agency: and therefore I ſhall direct the proceeds to be paid out to Mr. *Sykes* and Mr. *Ayre* conjointly.

April 15th 1815.

HUNTER, ROGERS.

JUDGMENT.

By the law of every maritime court of *Europe*, ſpoliation of papers not only excludes further proof, but does *per ſe* infer condemnation; the lenity of our code has however modified the rule to this extent, that, if all other circumſtances are clear, this circumſtance alone ſhall not be damnatory, particularly if the act was done by a perſon who has intereſts of his own that might be benefited by the commiſſion of this injurious act.

SIR *W. Scott*.—This ſhip, being an *American* ſhip, with a valuable cargo on board, part of which has already been condemned as *American* property, was captured on the 18th of *March* 1814, off the port of *Canton*, and after ſailing about for a few days, was carried to *Macao*, where the captain, and a perſon who is deſcribed as the ſupercargo, were releaſed at their own requeſt. The captain, it appears, made the beſt of his way to *America*, without returning to *Canton*, but, *non conſtat*, what became of the ſupercargo? The

The HUNTER.

April 15th, 1815.

ſhip and cargo were ordered by Sir *Samuel Hood*, the commander on that ſtation, to proceed to *England* for adjudication. It is proved that in coming home, the ſhip put into *Madras* Roads, where ſhe remained more than five weeks. Why ſhe ſtaid ſo long does not appear, but ſhe afterwards purſued her original voyage, as intended by the Admiral to *England*, where the preſent proceedings have been inſtituted, and where a claim has been given in very indiſtinct terms, by a gentleman who had ſuſtained a public *American* character in this country, for the greater part of the cargo as *Chineſe* property, belonging to *Honqua*, a ſubject of the Emperor of *China*.

In the courſe of the proceeding, the claimant has offered an affidavit made by a perſon in this town, who deſcribes himſelf as the agent of the judge of the Vice Admiralty Court at *Madras*, and ſtated that he had received a letter from that reſpectable perſon. The letter itſelf is not exhibited, but the affidavit ſtated, that it informed the perſon who received it, that, after a *detention* of three or four months in *Madras* Roads, and no proceedings inſtituted on the part of the captor to bring the ſhip and cargo to adjudication, a claim had been given there, and that the captor had, nevertheleſs, carried away the ſhip from *Madras* Roads, and brought her to *England*. It is not explained of what nature this *detention* was, or how impoſed, nor for whom the claim was given at *Madras*. It appeared to me, that the preſent claimant could have no right to produce ſuch an affidavit, becauſe the only legitimate purpoſe for which ſuch a party could give it would be to obtain a remitter of the cauſe to that juriſdiction which had been improperly declined; and this purpoſe could not be pretended by a party, who in the ſame breath, was praying this Court to proceed and to execute

The HUNTER.

April 15th, 1815

the function of reſtoring the property. Not being offered for that purpoſe, it could only be offered for the indirect purpoſe of creating a prejudice againſt the captor, which was to affect the mind of the Court in the queſtion between the two parties. Such an indirect purpoſe this Court could never ſanction, feeling it to be its proper duty to decide that queſtion upon its own proper merits, and that the learned Judge muſt conſider the production of his letter, or the ſtatement of its contents, in order to interfere at all with the performance of that duty, to be an unwarrantable uſe of his communication.

Certainly, if I underſtand this indiſtinct ſtatement to hold out any complaint on the part of the Judge, I need not ſay, that any complaint coming directly from ſo reſpectable a quarter, addreſſed in the proper form, and to the proper reſort, would be conſidered with all the attention that is due to it.—This Court is extremely diſpoſed to hold it as generally proper, that queſtions of capture, ariſing in that remote part of the world, ſhould be decided there in the Courts inſtituted for that purpoſe, although this Court, poſſeſſing an univerſal juriſdiction has of courſe a concurrent juriſdiction with them all. At the ſame time, without meaning to give any undue encouragment to another practice, I am not prepared to ſay, that circumſtances may not poſſibly occur, in which the contiguous Courts may not be the moſt convenient to the King's cruiſers in a fair legal eſtimate of convenience. Exigencies of the public ſervice may call upon them to proceed to *Europe*; the nature of the cargoes taken may render them unfit for the *Indian* market in caſe of neceſſary converſion pending ſuit; the property may appear to belong to parties, who are more in the vicinity of the *European* Court of prize, and can communicate

The HUNTER.

April 15th, 1815.

nicate with it much more promptly. Theſe, and other circumſtances, may influence a juſt and cautious diſcretion. Nor am I prepared to ſay, that if a King's cruiſer has upon juſtifiable reaſons directed his prize to proceed to *England*, the mere coming into roads, *in itinere*, will induce a legal obligation to proceed to adjudication in the Court that has the local juriſdiction. Ships muſt, in ſo long a voyage, touch at ſome intermediate places for purpoſes of neceſſary refreſhment. It is, and muſt be, ſo done by all ſhips, and it is not the mere going in *in tranſitu* for ſuch an occaſion, that will make it at all unlawful for the veſſel to proceed upon the original deſtination, if otherwiſe proper. I do not apply theſe principles to the preſent caſe, becauſe the facts, as ſtated, do not at all enable me to do ſo; but I think it not inexpedient to intimate ſo much of the diſpoſitions of this Court, and likewiſe of its legal opinions upon theſe ſubjects.

I proceed to the matter of the preſent caſe. I have already obſerved that the captain, and the perſon called the ſupercargo, were withdrawn at *Macao*, very improperly, without doubt, but in a way that can give neither of theſe parties a right to complain, being a joint act, done by the conſent of the one, at the ſolicitation of the other. The only parties who have a right to complain are the Court on the one ſide, and the aſſerted proprietor on the other, who are robbed of the proper evidence on which the caſe ought to be conſidered. The effect of this miſmanagment is, that, in truth, only one real witneſs is produced—the mate; the other a negro cook, picked up juſt before the ſailing, being quite ignorant of the whole buſineſs. In the depoſition of the witneſs, it appears, that "the "laſt voyage of the ſhip commenced at *Boſton*, in "*North America*, and was to have ended on the re-

The HUNTER.

April 15th, 1815.

" turn of the ſaid ſhip to *Boſton*, after having gone to " the *South Seas*, and *Canton* in *China*; and during " the ſaid voyage, before ſhe was taken, (ſhe, after " leaving *Boſton*, where ſhe took on board a cargo " conſiſting of iron axes, hatches, axe-handles, hat- " chet-handles, chiſſels, files, ivory knives, razors, " ſciſſars, and looking glaſſes, for trade with the " Indians), ſailed therewith, firſt of all, to *Otaheite*, " for proviſions (the people on board being ſick), but " was bound to the *Fergus Iſlands*, in the *South Seas*, " and from *Otaheite* ſhe ſailed to the *Marqueſas Iſlands*, " in conſequence of getting information that Sandal- " wood was to be had there; but the captain not think- " ing the Sandal-wood was good there, the ſaid ſhip " left the ſaid iſlands, and ſailed to *Huwiana*, one of " the *Society Iſlands*, where they took in water and " freſh proviſions, and bartered a few looking-glaſſes " and other articles for the ſame, and then ſailed to " *Tocarobu*, one of the *Fergus Iſlands*, where part of " the aforeſaid cargo was bartered for about forty-tons " of Sandal-wood, and then the ſaid ſhip proceeded " to the *Marqueſas Iſlands* again, where a further part " of the cargo was bartered for Sandal-wood, which " was found to be better than at firſt was ſuppoſed; " and the ſaid ſhip having then completed her cargo of " Sandal-wood, ſhe then proceeded therewith, and " with the remainder of the outward cargo, where " the whole of the cargo of Sandal-wood was ſold and " delivered; but the remainder of the out-ward cargo " conſiſting of iron, was left on board for another " voyage to the *Marqueſas*, to which ſhe accordingly " ſailed from *Canton*, having taken nothing but pro- " viſions at the laſt-mentioned place; and, on the ſaid " ſhip's arrival at the *Marqueſas Iſlands*, the remainder " of the ſaid outward cargo of iron (except about fif-

" teen

" teen tons, and about eighteen hundred weight of ſteel) " was there bartered for another cargo of Sandal-wood, " with which the ſhip ſailed to *Canton*, and then " ſold and delivered the ſaid cargo of Sandal-wood, " and the remainder of the ſaid outward cargo, except " the eighteen hundred weight of ſteel; that it was " in the month of *February*, 1813, when the ſaid ſhip " arrived at *Canton* the ſecond time, and the ſaid ſhip " was then about to take on board a cargo of tea " for *Boſton*; but, juſt at the time when the ſuper- " cargo had purchaſed one choap load of teas, and " two boxes of Nankeens, information was received " of the war having broken out between *Great Britain* " and *America*, and thereupon the ſupercargo deſiſted " from making any further purchaſes, and the teas " which he had then already bought, were lodged in the " merchants warehouſes at *Canton*, and the ſhip was " ſtripped and laid up, and ſo continued till the " firſt day of *March* 1814, when ſhe began to " take in the cargo which ſhe had on board at " the time when ſhe was ſeized and taken, conſiſting " of teas, alum, and Nankeens (the eighteen hun- " dred weight of ſteel remaining on board the " ſhip, and being alſo on board at the time of " capture), and ſhe ſailed from *Canton*, which was " her laſt clearing port, on the 17th of the ſaid month " of *March* 1814, and was captured on the 18th," the very day after ſhe quitted *Canton*. The whole of the cargo, he ſays, except the ſteel, was put on board at *Canton*, between the 1ſt and the 16th day of *March* 1814. Being called upon to anſwer, as to the ſhip- ment of the property now in queſtion, he ſays, that " it " was, as *he underſtood*," that is the guarded way in which he expreſſes himſelf, " ſhipped on board the " ſaid veſſel by one *Honqua*, a *Chineſe* merchant, and

 " a native

The HUNTER.

April 15th, 1815.

" a native of *China*, living at *Canton*, but whom he " never ſaw, for his own account, and to be de- " livered in *America*." Now if *Honqua* was really the lader of theſe goods, it is a little extraordinary that he ſhould never have been ſeen by this witneſs, the mate of the veſſel, who is the perſon commonly employed in managing the ſhipment of the cargo. When aſked as to the property, he is unable to anſwer: He ſays that, " whoſe real property that part of the ſaid " cargo was and is, or to whom the ſame was and is " conſigned, or for whoſe real account, riſk, and " benefit, the ſaid goods were to have been delivered " in *America*, he cannot anſwer." This ignorance of the mate, together with the defect of papers, renders it a caſe ſtanding in need of further proof, if the parties are entitled to give it. But a fact appears, that renders this queſtionable, and that is, a ſpoliation of papers committed by the maſter, the agent of *Honqua*, and admitted ſo to be by the confeſſion of fact ſpoken to by this witneſs.

It is certain, that, by the law of every maritime Court of *Europe*, ſpoliation of papers not only excludes further proof, but does, *per ſe*, infer condemnation, founding a preſumption, *juris et de jure*, that it was done for the purpoſe of fraudulently ſuppreſſing evidence, which, if produced, would lead to the ſame reſult; and this ſurely not without reaſon, although the lenity of our code has not adopted the rule in its full rigour, but has modified it to this extent, that, if all other circumſtances are clear, this circumſtance alone ſhall not be damnatory, particulary if the act was done by a perſon who has intereſts of his own that might be benefitted by the commiſſion of this injurious act. But though it does not found an abſolute preſumption *juris et de jure*, it only ſtops ſhort of that, for it certainly

The HUNTER. April 15th, 1815.

tainly generates a moſt unfavourable preſumption. A caſe, that eſcapes with ſuch a brand upon it, is only ſaved ſo as by fire. There muſt be that overwhelming proof ariſing from the concurrence of every other circumſtance in its favour that forces a conviction of its truth, in ſpite of the powerful impreſſion which ſuch an act makes to its entire reprobation. It is the leſs neceſſary to examine this minutely, becauſe the Court has admitted the introduction of proof not profeſſedly and formally in that character of further proof, but manifeſtly ſo to be conſidered in ſubſtance and effect, conſiſting of affidavits and papers, that do not appear to have been on board this veſſel. The queſtion remains, whether, with the advantage of all the evidence that has been admitted, it anſwers the deſcription of a caſe in which an unfortunate act of ſpoliation occurs, but which, in all other reſpects, wears the aſpect of perfect ſincerity and truth. In conſidering that queſtion, it may be proper to conſider the conduct of the parties, for conduct is a good expoſitor of facts. If the parties act in a way conſiſtent with their ſtatement, it greatly confirms the ſtatement; if, on the other hand, they conduct themſelves in a way that appears utterly irreconcilable with it, then it is not too much to ſay, that the credibility of the ſtatement is deeply affected by the contradiction of the facts.

The Captain of this ſhip, as far as appears, was employed as a mere navigator, for a ſupercargo, was ſent from *America* on the outward voyage, who was intruſted with the management of the concern. The ſhip was laid up for months at *Canton*, the return-voyage being defeated. How this man, the captain, was introduced to *Honqua*, how he negotiated with him, or how he was authorized by his owners ſo to do *non*

The HUNTER.

April 15th, 1815.

conſtat. No inſtructions, no charterparty, no correſpondence, is produced. But, ſomehow or other, he is intruſted with the conveyance of this valuable cargo to *America* on *Chineſe* account. The ſhip is captured immediately on quitting the harbour, and he is taken in the fact of deſtroying the papers. He is brought back with this property ſo captured, and with the conciouſneſs of having expoſed it to particular peril by this act of inadvertency. What would a man of common diſcretion and common honeſty have done in ſuch a caſe? Moſt certainly he would have reſorted to the *Chineſe* merchant; acquainted him with all that happened; offered his ſervices for the preſervation of the property; requeſted freſh evidences; and accompanied the ſhip to *Macao*, where he ſwears he underſtood ſhe was to go for adjudication. No man of common honeſty could have ſtopped ſhort of this. Does he do ſo? Quite the contrary; for he ſwears poſitively that he never went back to *Canton*. Did he correſpond with his owner? It is impoſſible that he ſhould have ſo done; becauſe, ſending in this further proof, he muſt have ſent in this correſpondence, if it ever exiſted. He makes not the moſt diſtant reference to it, or to any one tranſaction with his owner; but he turns his back entirely upon poor *Honqua* and his intereſt, and flies away to *America* by the very firſt ſhip, and, as it happens, by the very ſhip that carries *Honqua*'s letter unknown to him, and proving *Honqua* to be entirely unapprized of the capture. Is this poſſible, conſiſtent with the fact, that he knew *Honqua* to be the ſole owner of this valuable property, and that the *American* merchants had nothing to do with it? The man who, with ſuch knowledge, acts in ſuch a manner, renounces all pretenſions to common integrity. His conduct can be accounted

The HUNTER. April 15th, 1815.

accounted for only on the ſuppoſition that he perfectly well knew the contrary. Taking it either way, I feel I do not carry it too far in withholding credit from this perſon, looking at what he ſays and what he does.

Of the ſupercargo, we know nothing; he is withdrawn from all view. What became of him, whether he remained in *China*, or, as is more probable, returned along with the captain to his own country *non conſtat*. If the latter, it is very extraordinary that there is no affidavit from him; for, though he is held out as a perſon who had nothing to do with *Honqua*'s property, yet one would naturally expect that, mixed up as he is with the foundations of this buſineſs, his own ſenſe of juſtice, and the requeſts of his employers, who are deſcribed as the agents of *Honqua*, would have extracted an affidavit from him, explanatory of the circumſtances, as far as he knew them. But no affidavit of his is produced. However, there muſt have been ſome correſpondence with the owners of the ſhip in *America*; and, if ſuch correſpondence were producible, it muſt have been produced. They could not but be ſenſible that the caſe muſt labour under the heavieſt ſuſpicions. Here is a ſhip, which goes with a valuable cargo on a trading voyage of very protracted length, and with many converſions of the property in the courſe of many adventures; with the fruits of theſe, ſhe goes into *Canton*, with the intention of carrying back the funds ſo acquired to *America*, veſted in a valuable cargo,—the loading of which was begun, but afterwards diſcontinued on account of the news of war. The parties muſt have been aware that it was extremely obvious to ſuſpicion, in ſuch a caſe, that artificial modes would be reſorted to,

to

The HUNTER.

April 15th, 1815.

to effect the purpoſe; that the name of a *Chineſe* would be borrowed or aſſumed for the protection of the return-property; that, to repel this preſumption, it ought to be documented in every part of it in the fulleſt manner; and that, even without taking into account the ſpoliation of papers, no proof that could be produced could be deemed ſuperfluous of further proof admitted. But no correſpondence is produced; nor any thing, in the depoſition of the witneſs, or the affidavit of the maſter, that is at all ſatisfactory. All that is produced is, a duplicate of the bill of lading, ſigned by *Rogers*, the maſter, whoſe title to credit is very infirm; and two inſtruments, purporting to be ſigned by *Honqua*, one an invoice, declaring it to be for his account and riſk,—the other a very ſhort and meagre letter, containing a very ſlight reference to this ſhipment. This letter purports to be addreſſed to Meſſrs. *James* and *J. H. Perkins*, and is in theſe terms: "I have now the honour to hand you invoice "and bill of lading of a trifling ſhipment, made by "this veſſel on my account, amounting to $2447\frac{20}{100}$, "which you will pleaſe to receive, and diſpoſe of as "you may think adviſeable. I muſt beg the favour "of your having the teas particularly examined be- "fore ſold, as they are a parcel ſent from the country "on my own account, and are much ſuperior to thoſe "generally ſent to the United States, and well cal- "culated for family uſe. I alſo incloſe you invoices "and bills of lading of my ſhipments, per *Hunter* and "*America*, the former amounting to $40,101\frac{18}{100}$, and "the latter to $22,110\frac{44}{100}$. The *Hunter* ſailed about "a week ſince, and will, I hope, be with you in due "time. It is poſſible the *America* will go to *New* "*York*, in which caſe you will conſign the property

" by

" by her to our mutual friends Meſſrs. *Le Roy*, " *Bayard*, and *M'Evers*: ſhould either of the veſſels, " in which I have ſhipped property, be unfortunately " taken, I wiſh you, as my attornies, to claim in my " behalf; and, if proof ſhould be required, it can " be forwarded hereafter. I am, gentlemen, reſpect- " fully, your humble ſervant, *Honqua*." It is quite impoſſible that this can be the only letter from *Honqua*, if it really comes from him. But of that there is no evidence but the ſimilitude of hand-writing, as atteſted by a perſon in *America*, who profeſſes to know his hand, and the Meſſrs. *Perkins*, the *American* conſignees; and theſe documents, with a diſclaimer, on their part, of their property, and an expreſſion of their belief that it belongs to *Honqua*, is the whole evidence upon which the Court is expected to decree a reſtitution.

Such is the general deſcription of this caſe. If we deſcend to the particular circumſtances of it, every ſtep confirms the ſuſpicion. The mate, who ought to have been thoroughly acquainted with all the circumſtances, evidently betrays his own ſuſpicions; he never could have depoſed in the manner he has done, if he had not a ſincere belief that the account given him was inſincere and faithleſs. Is it a poſſible thing that he, the mate, ſhould never have ſeen *Honqua*, the ſhipper of this valuable cargo? That foul circumſtance, the ſpoliation of papers, is admitted, and an explanation is attempted, that adds to the apparent faithleſſneſs of the tranſaction. The account given is explanatory, but not true. What Captain *Rogers* ſtates in his affidavit is this, " that, on the approach " of the *Doris*, he *committed to the flames* all the let- " ters, papers, &c. of every deſcription, on board " the

The HUNTER.

April 15th, 1815.

" the ſhip *Hunter*, from an apprehenſion that the ſaid " papers might contain information of the intended " departure or arrival of other *American* veſſels, and " that ſuch veſſels might, in conſequence, be more " expoſed to capture, ſhould the ſaid papers fall into " the hands of the captors; and that, amongſt thoſe " papers, he, in the confuſion attending his capture, " inadvertently conſumed the letters and papers of " *Honqua*, relative to the aforeſaid ſhipment." It is very improbable that this man ſhould have thus deſtroyed the papers that were neceſſary for the protection of the neutral property intruſted to his care. But the deſtruction of papers ſpoken to by the witneſs, is of a different kind. He ſays, that, " when the com- " mander of the *Doris* frigate came on board the prize " after the capture, he charged Captain *Rogers*, the " maſter, with having *thrown ſome papers overboard*, " after the colours of the ſaid prize were hauled " down, and ſaid, that he had ſeen him, through a " glaſs, throw ſuch papers overboard; and that Cap- " tain *Rogers*, in reply thereto, admitted that he had " ſo done, and ſaid, that the papers which *he had ſo* " *thrown overboard* were invoices of the cargo, and " ſome letters to merchants in *America*." This account leaves it ſtill open to the unrepelled preſumption that the papers which were thus deſtroyed muſt be the papers relating to the cargo on board this ſhip. I had expected that it would have been accounted for, how the claim comes to be given in ſo imperfect a manner. It evidently comes from *America*, and how it happens that thoſe who have directed the whole of this cargo to be claimed ſhould not know what it conſiſted of is an obſcure circumſtance. *Perkins* ſwears that it arrived in the ſhip that brought the documents

to

The HUNTER.

April 15th, 1815.

to *America* in *October*. The claim is not given till the 21ſt of *December*, near four months afterwards, and yet it is then claimed in this indiſtinct manner. When not only the claim, but likewiſe the evidence, comes from *America*, much is added to the weight of objection which that fact creates; for ſurely it is an objection of the weightieſt kind, that they come from the enemy, from the ſuſpected proprietors, or their agents, and do ſo, in direct contradiction to the intimation of the alleged *Chineſe* proprietor, that he ſhould forward the proofs himſelf.

I obſerve, that the cargo was not put on board till within a fortnight of ſailing, probably becauſe the arrangements were not completed before that time, and a communication to *Europe* previouſly made, that, if the cargo was taken, it ſhould be claimed, but the particulars not yet ſufficiently adjuſted.

Upon the whole of this caſe, I am clear that reſtitution cannot paſs. Is it a fit thing that, after the admiſſion of the further proof propoſed, after the ſpoliation of the papers ſo admitted and ſo inſufficiently accounted for, I ſhould, in a caſe ſo conducted by all parties as to defy any probability of truth, exerciſe ſtill more the patience of the Court by indulging the parties with the opportunity of introducing ſtill further proof? In my opinion, it is not. The concluſion I draw from this evidence is, that the property is not *Chineſe*; but if, notwithſtanding theſe revolting improbabilities, it really is ſo, the ſufferer muſt blame thoſe he has employed in the conduct of his tranſactions, and who have thrown that diſcredit upon them by which his intereſts are liable to be legally affected.

APPENDIX.

APPENDIX (D.)

Note to the Caſe of The *Hope* and others (page 226.)

THE principle of this judgment was ſubſtantially confirmed by the deciſion of the Lords of Appeal in the caſe of the *Reward, Hill maſter,* (9th *July* 1814), which was an appeal from the ſentence of the Vice Admiralty Court at *Halifax,* on the effect of the certificates or paſſports granted by Admiral *Sawyer,* in the form appearing in the *Hope.*

No caſe of the claſs heard in the High Court of Admiralty was carried before the Lords Commiſſioners of Appeal, but the circumſtances of the *Reward, Hill,* were preciſely ſimilar to thoſe in the *Hope*; and the Court of Appeal decided that the terms of the Order in Council, dated the 13th of *October* 1812, were applicable to the certificates or paſſports as expreſſed in the letters of Mr. *Allen,* and of Admiral *Sawyer* in anſwer thereto, and ſufficiently eſtabliſhed the validity of the certificates or paſſports that had been granted according to the terms of the Order *to American ſhips proceeding with cargoes of grain and flour from the ports of the United States to Spain or Portugal.* In the caſe of the *Charles, Avery,* (12th *July* 1814), which was an appeal from the Vice Admiralty Court at *Barbadoes,* and in ſome other caſes certificates or paſſports of the ſame kind, ſigned by Admiral *Sawyer,* and alſo by *Don Luis de Onis,* his moſt Catholic Majeſty's Envoy Extraordinary and Miniſter Plenipotentiary to the United States, had been uſed for voyages from *America* to certain *Spaniſh* ports in the *Weſt Indies.* The Lords of Appeal held, that theſe certificates or paſſports not being within the terms of the Order in Council did not afford protection, and their Lordſhips accordingly affirmed the ſentences of condemnation paſſed by the Vice Admiralty Courts in thoſe caſes.

In the caſes of the *Venus* and the *South Carolina,* (25th *June* 1814), a ſimilar queſtion aroſe on the effect of paſſports and certificates granted by Mr. *Foſter,* His Majeſty's Envoy Extraordinary and Miniſter Plenipotentiary, but not confirmed by an

Order

APPENDIX.

Order in Council, permitting *American* ſhips to ſail with proviſions from ports of the United States to the Iſland of *St. Bartholomew*.

On the part of the claimant it was contended, that although perſons holding the ſituation which Mr. *Foſter* did, had not in ſtrictneſs any authority to grant protection to veſſels or cargoes otherwiſe ſubject to the operation of hoſtilities and the laws of war, yet, the fact that he had exerciſed that authority for purpoſes that muſt be preſumed to be agreeable to his inſtructions, and beneficial to the intereſt of his country, would eſtabliſh an equitable claim, which their Lordſhips were bound to reſpect.

In ſupport of the ſentence of condemnation it was argued, that a Miniſter Plenipotentiary had no ſuch power as was indeed admitted; that this was a principle of general law, which perſons taking ſuch paſſports were bound to know and to notice. That the claimants had made no enquiries whether Mr. *Foſter* was furniſhed with any ſpecial power to grant certificates of this kind, and were therefore not miſled by falſe information upon that point: that it belonged to the Crown alone to grant ſuch exemptions from the laws of war, as had been ſtrongly expreſſed on ſeveral occaſions. (See the caſe of *Angelique*, 3 *Rob.* p. 7. of Appendix), and as the inſtruments were in themſelves invalid, their Lordſhips had no power to render them effective.

The Court affirmed the ſentences of condemnation in all the caſes in which the certificates or paſſports granted by Mr. *Foſter* were not within the terms of the Order in Council, by which certain deſcriptions of Licences granted by him had been confirmed.

INDEX.

INDEX.

A.

ADMIRALTY—Orders of—to ſeize a particular Ship, will indemnify the Captor from Coſts and Damages - 410
—— but will not affect his beneficial Intereſt in the Prize - *ibid.*
Agent——Duty of, to ſuperintend Law Proceedings - - 6
———— does not ceaſe upon the employment of a Broker - - - *ibid.*
—— Appointment of, may *generally* be revoked at the diſcretion of the Parties who made it - - 478
—— but not without juſt cauſe ſhewn if the Agent has duly regiſtered his Power, and conducted the Buſineſs practically to a conſiderable extent - - 479
Agency—Powers of, extending to Bounty as well as to Prize 478
Alien Enemy— may ſue for Wages earned on a voyage to this Country, under the Protection of a *Britiſh* Licence - - - 234—266—303
—— a Party ſo becoming by the Intervention of Hoſtilities is not at Liberty to proſecute an Appeal in the Courts of this Country - - - - 214
Appendix—A. contains order in Council, 31ſt *May* 1809 as to Trade with *Heligoland*.—B. Order in Council 26th *April* 1809, as to Blockade of Ports from which the *Britiſh* Flag is excluded.—C. Treaty of Peace between *Great Britain* and *Sweden*.—D. Note to the Caſe of *Hope*, relative to the Power of granting Paſſports to exempt the Property of the Enemy from Capture.

B.

Bail—Sureties not diſcharged from Reſponſibility by mere lapſe of time - - - 1
Bail Bonds—are given to the Court to abide the Adjudication of all Events impending before the Court at the Time the Bonds were executed - - - 53
—— but the Sureties are not reſponſible to the extent of ſuch a poſſible Contingence as that of a ſubſequent War - 54
Barbeyrac—(cited) - - - - 117
Blockade,—impoſed by the Orders in Council, nature of - 133
—— operates to the Excluſion of *Britiſh* as well of Neutral Ships - - - - 134

—— of

Blockade—continued.
—— how maintained - - - 425
—— of *Spaniſh* Ports, how far withdrawn - - 181
Bottomree Bonds,—not to be paid till after Mariners Wages 40
—— not valid unleſs granted under the preſſure of Neceſſity in a Foreign Port where the Maſter and Owners are without Perſonal Credit - - - 201
—— or in a Port of the Country in which the Owners reſide provided the Maſter has no means of communicating with them - - - - 273
—— of a later Date are entitled to Priority of Payment over thoſe of a former - - - 201, 289
—— not valid where the Lender looks to the Perſonal Security of the Borrower - - 287
—— may be valid, though Bills of Exchange were given at ſame Time by way of collateral Security - 466
—— may be valid, though granted on a hired Tranſport in the Service of Government - - 462
—— and although the Voyage on which ſhe was bound is not ſpecified in the Bond - - 463
—— Party lending Money on Bottomree is not bound to ſee to its due Application - - - 464
—— are not neceſſarily either good or bad *in toto* - - 288
—— may be valid though granted to the Conſignees of the Cargo by a Maſter appointed by themſelves - 280
Britiſh-built Ship—See *Navigation Laws*.
Britiſh Merchants—Claim of, for Advances made by them for the Uſe of the Owners of a Foreign Ship ſeized by Order of Government on the breaking out of Hoſtilities,—not allowed - - - 35
—— Claim of, for Money expended in the outfit of the Ship, immediately before the Seizure,—allowed - 358
Britiſh Subject may not trade with the Enemy unleſs by the Conſent of the Crown - - - 390
—— cannot ſhake off Allegiance to his Native Country - 223
—— may acquire a new National Character for Commercial Purpoſes - - - - *ibid.*
—— and if reſident in a Neutral Country, may trade with the Enemy in all Articles, with the Exception of thoſe of a Contraband kind - - - *ibid.*
—— but cannot at the ſame Time and in the ſame Adventure retain the Benefit of his National Character from the mere

INDEX.

Britiſh Subjects—continued.
mere Circumſtance of having left his Wife and Family in this Country - - - 224
Bynkerſhoek, Q. I. P. (cited) - - - 117

C.

Captor—the laſt Seizor is in Law the only Captor - 404
—— Title of, to Prize is the ſame whether acting upon his own Diſcretion or in Obedience to Orders from the Admiralty - - - 410
Capitulation—Articles of, apply only to the Inhabitants of the Country ſurrendered - - - 124
Cargo—muſt follow the fate of the Ship if involved in the ſame Fraud - - - 95
—— taken on board in a Port where the Ship had Permiſſion to touch for Clearance only is liable to Confiſcation - 168
—— though put on board without the Conſent of the Maſter - - - 269
Cartel—properly ſpeaking has Place between Belligerents only - - - 60
Certificate—See *Paſſport*.
Claim—general Injuſtice of, may be the ſubject of Cognizance in a municipal Court - - - 100
—— not ſupported by Affidavit, inſufficient - - 153
Coaſting Trade—of *Sweden* - - - 131
Colonial Port—illegal Uſe of - - - 130
Commiſſion—of the Commanding Officer not ſuperſeded, becauſe the Ship has become unfit for the Service for which ſhe was originally employed - - 220
Commander—Act of, in relinquiſhing Prize, is binding upon the Intereſts of all under him - - 405
—— is alone reſponſible for Coſts and Damages - - *ibid.*
Conſolato del Mare—(cited) - - - 116
Convoying Ship—Firſt Duty of, to take care of Convoy - 429
—— may be entitled to Benefit of Prize either as actual or conſtructive Captor - - 430—435
Coſts—liability of actual Captor to, for giving falſe Information to Joint Captor - - - 361
—— Commander is alone reſponſible for - - 405
Crompton—On Courts, (cited) - - - 118
Crown—Conſent of, neceſſary to legalize the Trade of *Britiſh* Subjects with the Enemy - - 390, 392
Cuſtom Houſe—Practice of in *Jamaica* - - 342

INDEX.

D.

Damage—Owners are reſponſible for, when occaſioned by the Miſmanagement of their Ship though under the Care of a regular Pilot - - - 467
Declaration of War—See *War*.
Derelict—See *Salvage*.
Diſpatches—Conveyance of, for the Government of a Neutral Country cannot be averred by the Owners as a Ground of Protection for a Ship engaged in a Voyage otherwiſe illegal - - - - 104
Diſguiſe—See *National Character*.
Domicil—a *Britiſh* Subject reſident in a Foreign Country and trading as a Foreign Merchant cannot retain the Benefit of his National Character by leaving his Wife and Family in this Country - - 224
Dominions—a conquered Country forms immediately Part of the King's Dominions - - 451
Droits of Admiralty—Ships and Cargoes ſeized in the Harbour of an Iſland conquered by *Britiſh* Forces, are condemnable as - - - 450
—— though the Conqueſt of the Iſland may not have been confirmed to *Great Britain* by a Treaty of Peace 452

E.

Eaſt India Goods—illegal Importation of into a *Britiſh* Colony- 144
Exchequer—Court of - - - - 323
Evidence—of releaſing Witneſſes not alone ſufficient to ſuſtain a Claim of Joint Capture - - - 19, 363
—— of Log, not admiſſible under the Circumſtances of the Caſe - - - - 9
Enemy—Trade with, by *Britiſh* Subjects, illegal, unleſs ſanctioned by the Crown - - - 390

F.

Flag and Paſs—Parties aſſuming the Flag and Paſs of a Foreign Country cannot claim the Benefit of their own National Character - - - - 132
—— but their real Character may be pleaded againſt them - - - - *ibid.*
Freight—none due where the Voyage has been wholly defeated - - - - 319
—— due upon the entire Cargo, though part thereof may have been ſold to defray the Expences of the Ship in a Foreign

Frieght—continued.
Foreign Port where the Owners of the Cargo are the Authors of the Delay which rendered the Expences neceſſary - - - 386

G.

Grotius—(cited) - - - 117

H.

Head Money—Where there has been a general engagement the whole Fleet is entitled to ſhare in the Head-money though the formal Surrender happens to be made to One Ship only - - - 43
—— actual Contribution of Aſſiſtance is neceſſary to entitle a Joint Captor to ſhare in Head-money - 44
—— Subject of, has undergone ſome Variations - - 439
—— is not granted unleſs the Act of Capture is conſummated *ibid.*
—— is due to the capturing Ship whether the Capture was produced by actual Combat or not - - - *ibid.*
—— is not due where neither the Ship, Guns, or Men have been acquired to this Country, or loſt to the Enemy 442
—— the Military Character of a Ship is not ſo loſt by Capture and Re-capture as to extinguiſh the right to Head-money - - - 367
Heligoland—not conſidered a Port of the United Kingdom though in the Poſſeſſion of *Britiſh* Forces - 55, 77
Honduras—a Dependency of *Jamaica* - - 337

I.

Identity—may be ſufficiently eſtabliſhed by Coincidence of Circumſtances - - - 351, 361
Jenkins Sir *Leoline*—(cited) - - - 109
Importation—See *Navigation Laws.*
Joint Capture—Claim of, not neceſſarily defeated by difference of Courſe - - - 15
—— defeated by a conjectural Courſe if erroneous - 16
—— not ſuſtained on the Ground of having occaſioned the Capture of an Enemy's Ship by diverting its Courſe - - - - 17
—— not ſuſtained upon the Evidence of releaſing Witneſſes only - - - - 19, 363
—— not ſuſtained on the Ground of antecedent or ſubſequent Services - - - 33
—— conſtructive Aſſiſtance by Boats will not entitle the Ship to which they belong to ſhare in the Prize - 20

Joint Capture—continued.
—— One of Two Chaſers being ordered to pick up the Boats of the other, and in conſequence of the Delay occaſioned by Obedience to thoſe Orders, loſing Sight of the Prize, is not entitled to ſhare with a Third Ship coming up and making the actual Capture - 61—*et ſeq.*
—— Claim of, by Ships which chaſed during the Day and afterwards continued the Purſuit in a right Direction though not in Sight, ſuſtained - - 346
—— Burthen of Proof lies on the aſſerted Joint Captor - 349, 363
—— Sight alone generally ſufficient to entitle King's Ships to ſhare - - - 360
—— Ships engaged in a Joint Enterprize under the Orders of the ſame Superior Officer, are entitled to ſhare in each others Prizes - - - - 372
Ireland—Ports of, deemed Foreign for Purpoſes of Hypothecation - - - - 205
—— Lord Lieutenant of, has no Power to authorize the Trade of *Britiſh* Subjects with the Enemy - - 391
Juriſdiction—of Inſtance Court of Admiralty - 100
—— of the Court of Admiralty over Bottomree Bonds allowed by the Courts of Common Law - - 203

K.

King—not bound by the Navigation Laws - - 320

L.

Laches—Parties muſt take the Conſequence of their own 458
Licence—to come to any Port of the United Kingdom, will not protect a Ship deſtined to *Heligoland*, though that Iſland had been reduced by Conqueſt into *Britiſh* Poſſeſſion - - - - 55
—— not granted till after the Fact of Capture, though bearing a previous Date, can afford no Protection - 160
—— permitting a Ship to touch at a prohibited Port for clearance, is violated by taking Goods on board in the prohibited Port - - - 168
—— fraudulent Application of - - 173
—— to a neutral Veſſel, will not enure to the Protection of an Enemy's Veſſel, but the Cargo, if belonging to *Britiſh* Subjects, not implicated in the Fraud, may be reſtored - - - - 183
—— the Violence of a hoſtile Government will not privilege Perſons to act in Contravention to the Terms of a *Britiſh* Licence - - - 241

License—continued.
—— to come to one Port of the United Kingdom will not protect a Voyage to another Port - - 257
—— for a Foreign Ship will not protect one that is in Fact and in Appearance *Britiſh*; but where the Ship has every Appearance of being Foreign, the Court will not enquire whether there is any concealed *Britiſh* intereſt - - - - 251
—— Benefit of extended to Perſons who have uſed due Diligence, notwithſtanding the Expiration of the Licence, and a Refuſal on the Part of Government to renew it 300
—— where the original Cargo has been ſpoiled by unavoidable Accidents, the Protection of a Licence is not forfeited by taking on board a freſh Cargo of the ſame Deſcription, notwithſtanding the Expiration of the Licence - - - - 305
—— fraudulent Alteration of, deſtroys its Validity, even where the Holder of the Licence is innocent of the Fraud - - - - 308
—— Expiration of will not juſtify the Capture of the Ship on her return Voyage - - - 316
Lien—on Ship for Money advanced - - 356, 358
Loccenius—(cited) - - - 117
Log—not admiſſible as Evidence under the Circumſtances of the Caſe - - - - 9

M.

Marque—Ship furniſhed with Letters of, to be deemed a Ship of War - - - 448
Maſter—has authority to hypothecate the Ship and Freight in a Foreign Port, where he and his Owners have no perſonal Credit - - - 204
—— or in a Port of the Country in which the Owners reſide, provided he has no means of communicating with them - - - 273
—— though appointed by the Conſignees of the Cargo, may be juſtified under the Circumſtances of the Caſe, in granting a Bond of Hypothecation to them - 281
Miniſter Plenipotentiary—Power of to grant certificates, exempting the Property of the Enemy from Capture —See *Appendix D.*

National

INDEX.

N.

National Character—Diſguiſe of aſſumed, for the Purpoſe of impoſing on the Enemy in all Wars - - 182

—— a *Britiſh*-born Subject may, by his Employment and Reſidence in a Foreign Country, acquire a new National Character for commercial Purpoſes - 223

Navigation Laws—prohibit the Conveyance of *European* Goods from one *Weſt India* Iſland to another - 71

—— but by a later Regulation (52 *G.* 3. c. 100.) permit ſuch Conveyance - - - 332

—— bringing Goods within the Harbour with an Intention to import them, conſtitutes an Importation within the Meaning of the Statutes - - 72—251

—— when a Veſſel enters a Colonial Port with Goods, partly permitted, and partly prohibited, and without any mention in her Clearance, of an ulterior Deſtination, the Preſumption of Law is, that all the Goods were coming for Importation - - 120

—— A *Britiſh*-built Ship transferred to Foreigners, but remaining oſtenſibly *Britiſh*, is liable to Condemnation for importing Goods into a *Britiſh* Colony - 152

—— and the Cargo, though belonging to different Perſons, and ſhipped under a perfect Ignorance of the Transfer of the Ship, muſt ſhare the ſame Fate - 156

—— Foreigners hired to take Care of a Cargo of Mules on board a *Britiſh* Ship, are not to be deemed Part of the Crew - - - - 311

—— are not binding upon the King ſo as to prevent the Conveyance of publick Stores from one Colony to another - - - - 320

Navy-Board—mode adopted by, in ſettling Accounts with Captors in Caſes where the Government has a Right of Pre-emption - - - 458

Neutral—has a Right to put his Goods on board a Merchant Veſſel belonging to a Belligerent - - 448

—— but not on board a Ship of War - - *ibid.*

Neutrality—Privileges of, forfeited by the Abandonment of perfect Indifference between the contending Powers 245

—— Claim of, may be given by the Neutral Government alone - - - - 412

Onus

O.

Onus Probandi—lies on the Claimant in Revenue Caſes - 152
—— on the Party aſſerting an Intereſt as Joint Captor 349—363
Order in Council—prohibiting Trade with the Enemy, applies to a Part as well as the Whole of a Cargo 57
—— for the Protection of the Coaſting Trade of *Sweden*, does not apply to Ships partly *Britiſh* owned - 131
—— Blockade impoſed by that of the 26th of *April* 1809, how maintained - - - - 425

P.

Part Owner—See *Privateer*.
Paſſengers—Right of, to ſhare in Prize - - 239
—— claim of, to ſhare in Salvage for Services to a derelict Ship, rejected - - 420
—— Conveyance of for hire, equivalent to conveyance of Cargo for Freight - - - 58
Paſſport—of a *Britiſh* Admiral permitting a Veſſel to deviate from the Courſe preſcribed by the Terms of the *Britiſh* Licence, by which ſhe was protected - 209
—— a *Britiſh* Conſul or Admiral has no power to grant Paſſports, exempting the Property of Enemies from the Effect of general Hoſtilities; but ſuch Paſſports may be made effectual by the Ratification of the Sovereign Power - - 226—*et ſeq.*
See alſo *Appendix D.*
Penalty—Diſtribution of - - - - 76
Poſſeſſion—Cauſe of, between Foreigners not entertained by the Court without the Conſent of the Parties, or the Sanction of the Repreſentative of the Foreign State 23
—— or the Judicial Order of a competent Court within the Territories of the State to which the Parties belong 24
Privateer—in a Court of the Law of Nations, a Perſon may be conſidered as the Part Owner of a Privateer, though his Name has never been inſerted in the Bill of Sale or Ship's Regiſter; and the Repreſentative of a Perſon ſo deemed a Part Owner is reſponſible for Coſts and Damages decreed againſt the Owners generally, though the Party of whom he is the Repreſentative, was not himſelf the Wrong-doer - - 290—*et ſeq.*
Proceeds—of Prize may be followed wherever they can be traced - - - - 25
Proteſt—not made in due Time - - - 195

INDEX.

R.

Ratification—See *Treaty of Peace.*
Recapture—by Land Forces - - - 119
——— by Boats - - - - *ibid.*
Releasing Witnesses—Evidence of, not alone sufficient to support a Claim of Joint Capture - 19—428
Representative—See *Privateer.*
Revenue Causes—Onus probandi, lies on Claimant 152

S.

Salvage—General Rate of, in Cases of Derelict - 421
—— Moiety decreed under the Circumstances - 49
—— Apportionment of, betweeen Salvors - - 50
—— Rate of, not to be increased on account of unnecessary Interference of second Salvors - - 417
—— Civil, in addition to Military - - 317
—— a Store Ship recapturing *British* Property, is entitled to an Eighth only - - - 253
—— Right of Recaptors to, not extinguished by subsequent Capture and Condemnation in an Enemy's Port, where the Sentence condemning the Property is overruled by an Order of Release from the Sovereign Power of the State - - - 192
—— extinguished by a regular Sentence of Condemnation carried into Execution - - - 200
—— Persons dispossessing original Salvors without reasonable Cause, shall receive no Benefit on account of Services they may afterwards perform - - 417
—— those who are in Possession of a Ship as Salvors, have a legal Interest, not to be divested but by Adjudication in a regular Court - - - 416
—— is due for the Recapture of Neutral Goods previously taken by the Enemy on board a *British* Ship of War 443—*et seq.*
St. Croix—See *Capitulation.*
Seizure—of Goods not actually on shore, may be made within a *British* Colony by the Officers of H. M. Navy - - - - 216
Setting forth for War—the Employment of a Vessel in the public Military Service of the Enemy, by those who have competent Authority so to employ her, is a sufficient

Setting forth for War—continued.
sufficient setting forth for War, within the Meaning of the Prize Act - - - 105
—— ſo if there is a fair Semblance of Authority in the Perſon directing the Veſſel to be ſo employed - 401
Ship—liable to Condemnation if belonging to the ſame Owners, with a Cargo illegally taken on board in a prohibited Port, although ſhe had Permiſſion to enter the Port to obtain a Clearance - - - - 168
—— employed in the Conveyance of Public Stores from one Colony to another, not liable to Confiſcation for a Breach of the Navigation Laws - - 345
—— Title to, though originally faulty, becomes unimpeachable by great Lapſe of Time - - 394
Spoliation—of Papers—Effect of, by general Maritime Law 486
———— by Law of this Country *ibid.*
Slaves—are deemed Perſonal Property, where there is no poſitive Regulation to the contrary - - 264
—— and paſs to the Captors under the Words of the Prize Act - - - - *ibid*
Slave Trade—deemed by this Country repugnant to the Law of Nations - - - - 85
—— though itdoes not preſume ſo to treat it when practiſed by the Subjects of a State which continues to tolerate it - - - - 86—95
—— the Court has a Right to enquire into the Title of a Ship employed in the Slave Trade - - 92
—— Inclination of the Court to diſcountenance - 97
—— prohibited by the *Swediſh* Government - - 98
Soldiers—on board a capturing Ship, though invalided, are entitled to ſhare in the Prize - - 236
Spain—Ceſſation of Hoſtilities againſt - - 181
—— Communication between the different ports of, interrupted - - - - - 275
Stair, Lord—(cited.) - - - 118
Store, Ship—See *Salvage*.
Stores, Public—Conveyance of, from one *Weſt India* Colony to another, not prohibited - - - 320
—— not included in Account of Exports - - 341
—— not entered at the Cuſtom Houſe, if imported in Tranſports - - - - *ibid.*
—— *Secus*, if in Merchant Veſſels - - - *ibid.*
Sweden—Coaſting Trade of - - - 101

INDEX.

T.

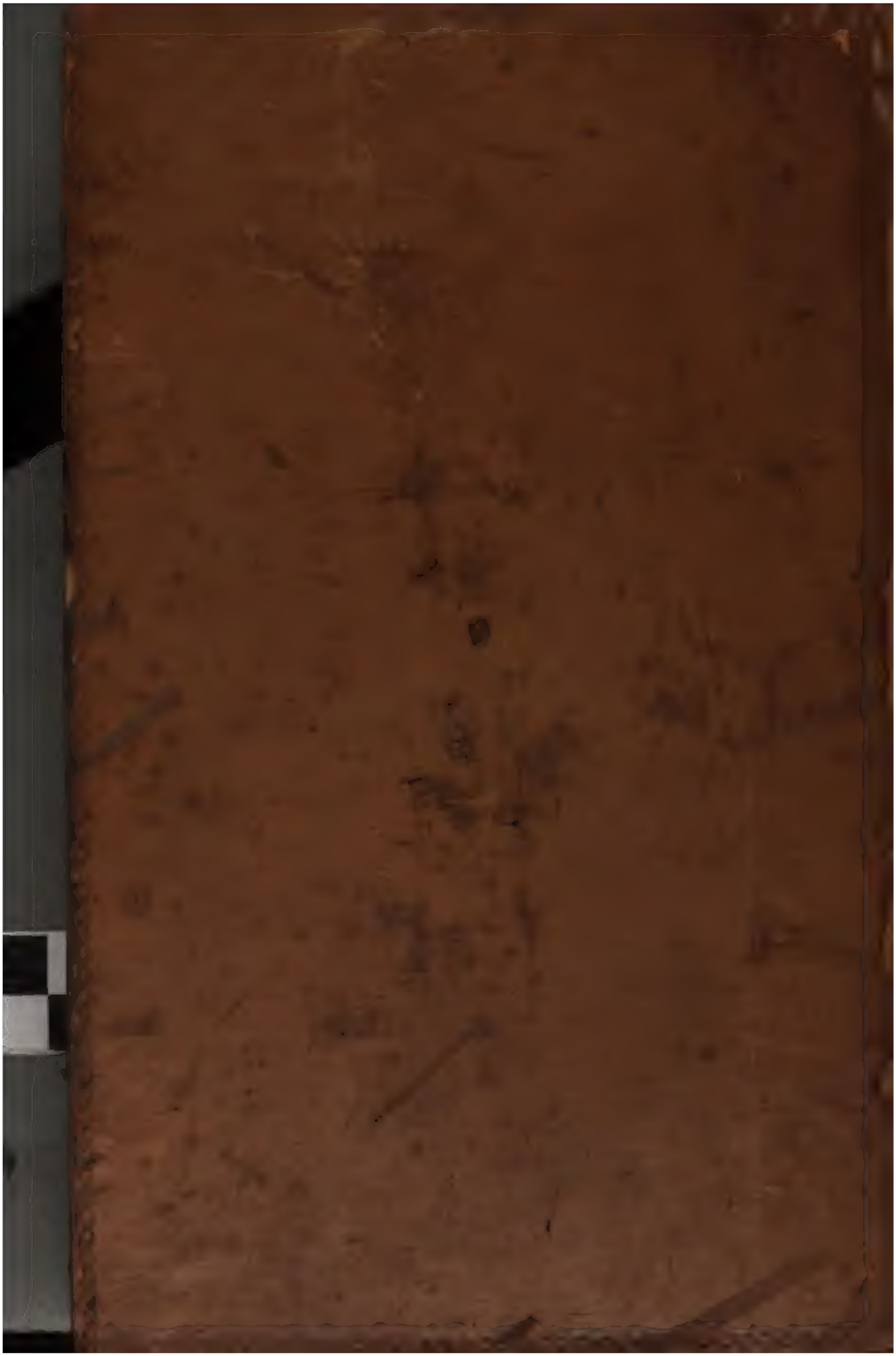
Territory—Claim of, can only be given by a State perfectly neutral - - - - - 245
—— and cannot be given but by the Neutral Government 412
Transfer—colorable.
Treaty of Peace—nature of, explained - - 249
—— by modern Uſage, muſt neceſſarily be ratified - *ibid.*
—— Effect of, in quieting Titles of Poſſeſſion - 395
Trading—Conveyance of Publick Stores, not a Trading 339
—— Importation of Goods for the Uſe of the Royal Family, not a Trading - - - 341
Tranſport—Veſſel hired by Government as a Tranſport may be the Subject of Bottomree - - 462

V.

Valin—(cited.) - - - - 118
Vattel—(cited.) - - - - 942

W.

Wages—of Mariners to be paid before Bottomree Bonds 40
—— Subſiſtence of Mariners on board *Greek* Ships, to be deemed Part of - - - 41
—— Suit for, will be entertained by the Court in the Caſe of an Enemy's Ship coming under the Protection of a *Britiſh* Licence - - 334—266—305
War—Declaration of, by the Government of one Country againſt another, is Evidence of the Exiſtence of a War between the Two Countries - - 247
Warrant of the Court of Admiralty will extend to Sails and Rigging, taken on ſhore for the Purpoſe of ſafe Cuſtody - - - 282
Weſt India Iſlands—Governors of, have of themſelves no Authority to permit the Importation of prohibited Goods - - - - 145

FINIS.

Printed by A. Strahan, Law-Printer to His Majeſty,
Printers-Street, London.